In this case, the lower court erroneously declared that Mr. Worthy's claim that *Skilling* decriminalized his alleged illegal conduct was "procedurally defaulted and [could not] be addressed directly by [the] Court on § 2255 review." JA – 42. We ask this Court to reverse and remand the proceedings to the district court, with instructions to evaluate Mr. Worthy's claim that *Skilling* decriminalized his conduct.

A. The District Court Failed to Provide the Parties with Fair Notice and an Opportunity to Be Heard As Is Required When It Chooses to Address Procedural Default Sua Sponte

When the government fails "to advance a procedural default argument", it has implicitly waived the argument. *Robinson v. Crist*, 278 F.3d 862, 865 (8th Cir. 2002). While a procedural default argument waived by the government can be heard *sua sponte*, *Jones v. Norman*, 633 F.3d 661, 666 (8th Cir. 2011), the court must give both parties "fair notice and an opportunity to present their positions" when it chooses to do so, *Dansby v. Hobbs*, 766 F.3d 809, 824 (8th Cir. 2014). When a court fails to afford parties "adequate notice and opportunity to be heard," the claim "must be remanded for further consideration." *Dansby*, 766 F.3d at 825; *see also Am. Red Cross v. Cmty. Blood Ctr. of the Ozarks*, 257 F.3d 859 (8th Cir. 2001).

Here, the lower court improperly raised and decided on the procedural default argument. The government failed to mention procedural default in its response to Mr. Worthy's motion for relief. JA – 37–38. Given this failure to advance the argument, the defense was waived and the district court's only pathway to addressing procedural default was to raise it *sua sponte*. That is precisely what the court did when it found that the *Skilling* claim, among others, was "procedurally defaulted and [could not] be addressed directly by this court." JA – 42. However, the district court failed to provide the parties with any notice or opportunity to be heard. The record is silent on any facts that may show that Mr. Worthy was aware that the court would consider such an issue. When

a party has no opportunity to respond, it is clear the court has overstepped its powers to consider arguments *sua sponte*. *See Barkley, Inc. v. Gabriel Bros., Inc.*, 829 F.3d 1030, 1041 (8th Cir. 2016). Because Mr. Worthy was never provided the option to respond to the argument that his *Skilling* claim was procedurally defaulted, the district court's finding cannot stand.

B. Worthy Satisfied the Cause and Prejudice Requirements to Overcome Procedural Default Even If the Court Validly Raised the Argument Sua Sponte

The district court must properly evaluate Mr. Worthy's *Skilling* claim because even if this Court finds that the lower court was proper in raising the argument *sua sponte*, Mr. Worthy showed cause and prejudice for failing to raise the claim.

The Supreme Court has noted that procedurally defaulted issues can still be heard if there was a proper cause and prejudice for not raising the issue. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Wainwright v. Sykes*, 433 U.S. 72 (1977) (holding that a showing of "cause" and "prejudice" can overcome procedural default in a habeas proceeding). Cause has been defined as "some objective factor external to the defense" that made it difficult or impossible to raise the issue properly. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A showing of ineffective assistance of counsel has been deemed satisfactory for the cause requirement. *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000). To show actual prejudice, there must be a "reasonable probability that the result of the trial would have been different." *Strickler v. Greene*, 527 U.S. 263, 289 (1999).

1. Worthy Received Ineffective Assistance of Counsel Satisfying the Cause Requirement

Mr. Worthy has demonstrated cause for the procedural default on the basis that he received ineffective assistance of counsel. The argument showing ineffective assistance of counsel has been laid out earlier in this brief. See section I. Given the explicit holdings that a showing of ineffective assistance of counsel satisfies the cause requirement, Mr. Worthy has shown that such cause exists.

2. Had Worthy's *Skilling* Claim Been Raised Initially There Is a Reasonable Probability That the Result Would Have Been Different Satisfying the Actual Prejudice Requirement

In *Skilling v. United States*, 561 U.S. 358 (2010), the Supreme Court narrowly interpreted 18 U.S.C. § 1346 as to not criminalize honest-services fraud in the absence of a kickback or a bribe. A kickback scheme is often defined by the court in the context of *McNally v. United States*, 483 U.S. 350 (1987), in which a public official arranged for a company to obtain public funds in exchange for that company sharing its commissions with "entities in which the official held an interest." *McNally*, 483 U.S. at 353. The Court in *Skilling* noted that a "mere failure to disclose a conflict of interest" does not make a scheme a kickback, but rather whether "the official conspired with a third party so that both would profit from wealth generated by public contracts." *Skilling*, 561 U.S. at 410. Subsequent proceedings have affirmed the definition of schemes as 'kickbacks' in situations when the government never received the contracted services, *Covington v. United States*, 739 F.3d 1087 (8th Cir. 2014) or when the payments made were excessive, *United States v. Redzic*, 627 F.3d 683 (8th Cir. 2010), among others.

In the present case, Mr. Worthy's failure to disclose his financial interest in Cleaner Pastures, while unwise and perhaps immoral, cannot be found to be illegal. There is no precedent for finding that a situation in which the government received the exact services it contracted for, JA – 20, the contracting party charged market, if not sub-market rates, JA – 20, and the public

official received no outside benefit in exchange for the act of providing contracts, JA – 63–65, could be classified as a kickback scheme. The only thing the record notes Mr. Worthy as being guilty of is betraying the public trust with his undisclosed self-dealing. JA – 24. But the Supreme Court "specifically rejected a proposal to construe the statute as encompassing" undisclosed self-dealing. *Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020). The record is devoid of evidence showing Mr. Worthy guilty of anything that has previously been considered a crime under 18 U.S.C. § 1346 since the *Skilling* decision. As such, there is a reasonable probability that if Mr. Worthy were to have been able to raise this claim the result of the trial would have been different. Thus, actual prejudice is satisfied, and this Court should hold that the lower court erred in finding this issue to be procedurally defaulted.

CONCLUSION

Because the failure of counsel to inform himself and his client of particularly relevant caselaw satisfies the *Strickland* test for ineffective assistance of counsel, this Court should reverse the decision of the district court and hold that Mr. Worthy's Sixth Amendment rights were violated and thus, he is entitled to habeas relief. Further, even if this Court does not agree that Mr. Worthy received ineffective assistance of counsel, this Court should reverse the district court's decision and remand for further proceedings because the lower court improperly dismissed his *Skilling* claim as procedurally defaulted in violation of this Court's binding precedent.

Applicant Details

First Name	**Nicolas**
Middle Initial	**C**
Last Name	**Oehler**
Citizenship Status	**U. S. Citizen**
Email Address	**nicoehler13@gmail.com**
Address	**Address** Street **1246 Garman Rd** City **Akron** State/Territory **Ohio** Zip **44313** Country **United States**
Contact Phone Number	**4196318350**

Applicant Education

BA/BS From	**Bowling Green State University**
Date of BA/BS	**May 2020**
JD/LLB From	**University of Akron School of Law** **http://www.uakron.edu/law/career**
Date of JD/LLB	**May 7, 2023**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Akron Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Horvath, George
ghorvath@uakron.edu
330-972-4990
Sahl, Joann
jsahl1@uakron.edu
330-972-7189

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Nicolas C. Oehler
1246 Garman Rd
Akron, OH 44313

May 26, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am submitting this letter to express my interest in a judicial clerkship in your chambers and to highlight my qualifications. Throughout my time at the University of Akron School of Law, I focused on gaining experience and performing well academically. I maintained a 3.74 GPA, ranked 13 in my class, and graduated *summa cum laude*. I was a research assistant to Professor Horvath, whose research focused on medical product liability under the Restatement (Second) of Torts and comment k. Amongst my other qualifications, I graduated *summa cum laude* from Bowling Green State University.

This past summer, I was a summer associate at Brennan, Manna, and Diamond and will continue there after taking the UBE in July 2023. Before my law clerk position, I was a judicial extern for the Honorable John R. Adams. I also completed a legal internship with GE Lighting, a Savant Company. To supplement these experiences, I participated in the law school's transactional clinic and the civil practice clinic, where I received my certified legal intern certificate to gain litigation experience.

In addition to gaining experience, I dedicated myself to performing well in academics and deepening my understanding of the law. I served as a production editor on the Editorial Board of the *Akron Law Revie*w. My student note, "*The Scrivener's Error: How Bankruptcy Judges Overrule Health Experts on Medicare Decisions*," was published in Volume 56 of the *Akron Law Review*. I also participated in the Business Law Society and Health Law Society.

Enclosed, please find my resume, writing samples, my transcripts, and letters of recommendation.
For ease of reference, here is the contact information for all recommenders should you wish to reach out directly:

Joann M. Sahl
Clinical Professor and C. Blake McDowell, Jr. Professor of Law
University of Akron School of Law
Email: jsahl1@uakron.edu
Phone: 330-972-7189

George Horvath
Assistant Professor
University of Akron School of Law
Email: ghorvath@uakron.edu
Phone: 330-972-4990

Vera Korzun
Associate Professor of Law
University of Akron School of Law
Email: vkorzun@uakron.edu
Phone: 330-972-6751

My experience and academic achievement will enable me to be an immediate and valuable contributor to your judicial work. Thank you for your consideration; I hope to hear from you soon.

Sincerely,

Nicolas C. Oehler

Nicolas C. Oehler

nicoehler13@gmail.com
(419) 631-8350
1246 Garman Rd
Akron, OH 44313

Experience

Law Clerk | Brennan, Manna & Diamond | Akron, Ohio — Summer 2022 to Present

- Participated in the summer associate program, gaining experience in health, corporate, business, tax, real estate, and employment law. Continued as a part-time law clerk
- Completed various transaction and litigation projects, including drafting motions, agreements, corporate documents, presentations, and research memorandums
- Observed and participated in numerous conferences, client meetings, and hearings

Judicial Extern | U.S. District Court of Northern Ohio, Judge John R. Adams | Akron, Ohio — Spring 2022

- Drafted orders for motions to dismiss, judgment on the pleadings, and summary judgment for the Honorable John R. Adams
- Researched and gained experience in criminal and civil litigation, including employment, corporate, education, civil rights, environmental, contract, constitutional, and tort law
- Observed various conferences, hearings, and trials and attended attorney arguments

Legal Intern | GE Lighting, A Savant Company | East Cleveland, Ohio — Summer 2021

- Gained experience in several areas of law and completed various projects relating to employment, labor, contract, antitrust, intellectual property, and property law
- Researched and drafted arguments for union arbitration and a memo regarding terms of use and mass individual arbitrations
- Amended commercial contract, assisted in updating terms and conditions for a smartphone application, and prepared an antitrust presentation
- Investigated an intellectual property rights issue with a joint venture
- Assisted in commercial real estate transactions and lease
- Worked cooperatively with human resources by drafting and researching relevant employment law, including new policies, procedures, and company-wide job descriptions and job restructuring

Healthcare Administration Intern | Avita Health System | Galion, Ohio — Summer 2019

- Supported executives of human resources, information technology, supply chain, marketing, corporate compliance & privacy, finance, ancillary services, physician services, corporate relations, and nursing
- Developed working skills in marketing and communication through content creation, and support at community-based meetings, outreach, and events
- Supported critical employee records review through audit of physician contracts and updates to employee files
- Promoted quality improvement by enhancing the nurse productivity reports and conducting studies on emergency department productivity

Education

The University of Akron School of Law — May 2023

Juris Doctor, *summa cum laude*; Sitting for UBE (Ohio), July 2023
Current GPA: 3.74 (Top 15%/Rank:13)
Organizations: Akron Law Review - Production Editor/Editorial Board; Health Law Society; Business Law Society
Clinics: SEED (Transactional) Clinic; Civil Litigation Clinic – Certified Legal Intern
Honors and Publications: Volume 56 of the *Akron Law Review*: "*The Scrivener's Error: How Bankruptcy Judges Overrule Health Experts on Medicare Decisions*"; Dean's List Recipient
Research Assistant for Professor George Horvath (Spring 2023): Researching strict liability, comment k, and medical devices

Bowling Green State University — May 2020

Bachelor's in Applied Health Science, *summa cum laude* - Healthcare Administration Specialization
Honors: 2020 Outstanding Senior in Public Health; Dean's List Recipient

Community Engagement

- Family Ministries Coordinator at St. Paul United Methodist Church (2018 to 2020, Galion, Ohio)
- Intern with United Methodist Church (Summer 2018, Carrollton, Ohio) (Summer 2020, Ashland, Ohio)
- Eagle Scout, Boy Scouts of America
- Notetaker for the Office of Accessibility at the University of Akron
- Pro Bono Hours with the University of Akron School of Law: 150+

OFFICIAL ACADEMIC TRANSCRIPT

The University of Akron

Ronald L. Bowman, Jr., University Registrar

Name: Nicolas Oehler
Student ID: 4760950

Page 1 of 1

SSN: xxx-xx-2871
Birthdate: 12-18-xxxx
Print Date: 05/23/2023

Beginning of Law Record

2020 Fall

Program: Law School Full-time Program
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
9200 601	Civil Procedure - Fed Juris	3.000	3.000	A	12.000
9200 609	Fundamentals of Lawyering	0.000	0.000	CR	0.000
9200 611	Contracts	4.000	4.000	A	16.000
9200 619	LARW I	3.000	3.000	B	9.000
9200 625	Torts	4.000	4.000	A	16.000
Term GPA	3.786 Term Totals	14.000	14.000		53.000
Cumulative GPA	3.786 Cumulative Totals	14.000	14.000		53.000

2021 Spring

Program: Law School Full-time Program
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
9200 602	Civil Procedure - Fed Litiga	3.000	3.000	B+	9.900
9200 607	Criminal Law	3.000	3.000	A	12.000
9200 620	LARW II	3.000	3.000	B+	9.900
9200 645	Property	4.000	4.000	A-	14.800
9200 676	Legislation and Regulation	2.000	2.000	A	8.000
Term GPA	3.640 Term Totals	15.000	15.000		54.600
Cumulative GPA	3.710 Cumulative Totals	29.000	29.000		107.600

2021 Fall

Program: Law School Full-time Program
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
9200 603	Const Law: Govt Authority	3.000	3.000	A	12.000
9200 608	Evidence	3.000	3.000	A-	11.100
9200 618	Advanced Legal Research	1.000	1.000	A	4.000
9200 626	Business Associations	4.000	4.000	A-	14.800
9200 656	Law Review Staff	1.000	1.000	CR	0.000
9200 688	Legal Drafting	2.000	2.000	A	8.000
Term GPA	3.838 Term Totals	14.000	14.000		49.900
Cumulative GPA	3.750 Cumulative Totals	43.000	43.000		157.500

2022 Spring

Program: Law School Full-time Program
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
9200 604	Const Law: Individual Rights	3.000	3.000	B+	9.900
9200 612	Professional Responsibility	3.000	3.000	A-	11.100
9200 656	Law Review Staff	2.000	2.000	CR	0.000
9200 685	Wills, Trusts & Estates	4.000	4.000	B+	13.200
9200 696	Externship Program	3.000	3.000	CR	0.000
Term GPA	3.420 Term Totals	15.000	15.000		34.200
Cumulative GPA	3.687 Cumulative Totals	58.000	58.000		191.700

2022 Fall

Program: Law School Full-time Program
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
LAWX 622	Administr of Criminal Justice	3.000	3.000	A-	11.100
LAWX 638	Family Law	3.000	3.000	A	12.000
LAWX 658	Law Review Editorial Board	2.000	2.000	CR	0.000
LAWX 668	Remedies	3.000	3.000	A-	11.100
LAWX 669	UCC-Sales	3.000	3.000	A	12.000
LAWX 683	SEED Clinic	2.000	2.000	CR	0.000
Term GPA	3.850 Term Totals	16.000	16.000		46.200
Cumulative GPA	3.717 Cumulative Totals	74.000	74.000		237.900

2023 Spring

Program: Law School Full-time Program
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
LAWX 613	Pro Bono Service Requirement	0.000	0.000	CR	0.000
LAWX 653	Experiential Learning	3.000	3.000	A	12.000
Course Topic:	EL: Int'l Negotiations				
LAWX 658	Law Review Editorial Board	0.000	0.000	CR	0.000
LAWX 684	Sem: Selected Legal Problems	2.000	2.000	A	8.000
Course Topic:	Sem: FCIL				
LAWX 684	Sem: Selected Legal Problems	3.000	3.000	A-	11.100
Course Topic:	Sem: Adv. Business Assoc.				
LAWX 691	Civil Practice Clinic	2.000	2.000	CR	0.000
LAWX 718	MBE Skills for the Bar Exam	1.000	1.000	CR	0.000
LAWX 722	3L Extended Bar Review Course	3.000	3.000	CR	0.000
Term GPA	3.888 Term Totals	14.000	14.000		31.100
Cumulative GPA	3.736 Cumulative Totals	88.000	88.000		269.000
Law Career Totals					
Cumulative GPA:	3.736 Cumulative Totals	88.000	88.000		269.000

----- End of Transcript ----

The University of Akron
Office of the University Registrar
Akron, OH 44325-6208
www.uakron.edu/registrar • 330.972.8300

TRANSCRIPT KEY

ACCREDITATION

The University of Akron is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. In addition to university-wide accreditation, various schools, departments and academic programs are accredited by their respective professional accrediting agencies.

GRADING SYSTEM

All attempted coursework is posted to a student's academic record.

The following grades are included in the grade point average:

Grade	Undergraduate and Law Courses Quality Points	Graduate Courses Quality Points
A	4.0	4.0
A-	3.7	3.7
B+	3.3	3.3
B	3.0	3.0
B-	2.7	2.7
C+	2.3	2.3
C	2.0	2.0
C-	1.7	1.7
D+	1.3	0.0
D	1.0	0.0
D-	0.7	0.0
F	0.0	0.0

Grades earned for courses that have been academically reassessed are excluded from the calculation of the cumulative grade point average but remain on the student's academic record.

The following grades/symbols are not included in the grade point average:

Grade/Symbol	Description
I	Incomplete
PI	Permanent Incomplete
IP	In Progress
AUD	Audit
CR	Credit
NC	No Credit
NCR	No Credit
WD	Withdrawn
NGR	No Grade Reported
INV	Invalid Grade Reported

GRADE POINT AVERAGE

The grade point average (GPA) is computed by multiplying the quality points of each grade by the number of units of credit, summing and dividing the total number of quality points by the associated total number of attempted units of credit.

ACADEMIC CALENDAR

Prior to September 30, 1968, The University of Akron academic calendar was based on a sixteen-week semester system. Between October 1, 1968, and September 4, 1978, the academic calendar was based on an eleven-week quarter system. Since September 5, 1978, the academic calendar has been based on a sixteen-week semester system with summer sessions varying in length.

COURSE NUMBERING SYSTEM

Prior to September 30, 1968, courses numbered 300 and above reflected graduate-level work. Since October 1, 1968, courses numbered 500 and above have reflected graduate-level work.

ACADEMIC STANDING

Students remain in good academic standing by maintaining a cumulative grade point average of 2.00.

IMPORTANT ACADEMIC POLICIES

Review the applicable undergraduate or graduate bulletin or law handbook online at www.uakron.edu/registrar/bulletins/ for additional information regarding important academic policies that impact the student's academic record. Such policies include, but are not limited to, academic dismissal, academic reassessment, alternative credit, course repeat, course withdrawal, developmental programs, transfer credit and university honors.

RELEASE OF INFORMATION

In accordance with the Family Educational Rights and Privacy Act of 1974, as amended, you are hereby notified that this information is provided upon the condition that you, your agents or your employees will not permit any other party to have access to this record without first obtaining the written consent of the student. The academic record is an "education record" under P.L. 93-380 and may not be disclosed to a third party without the student's prior written consent.

SPECIAL CREDIT/NO CREDIT GRADING BASIS FOR SPRING 2020

A special credit/no-credit grading basis was implemented for Spring 2020 enrollment only. CRX denotes credit earned. NCX denotes no credit earned. This special grading basis has no impact on the GPA.

01/15

May 26, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to offer my strong support for Nicholas Oehler's application for a judicial clerkship. Nic is a third year student at Akron Law, and will be graduating in May. My assessment of Nic's qualifications is based on my contact with him when he was a first-semester law student in my Fall 2020 Torts class and in his ongoing role as one of my research assistants.

As a first-semester student in his Torts class, Nic consistently stood out for his meticulous preparation and for his ability to grasp the real-world effects of the Tort doctrines we studied. He exhibited a strong knowledge of the facts and of the legal issues in the cases that were assigned. At a stage at which many of his classmates were struggling to understand each day's material, Nic was able to draw connections (and spot inconsistencies) with material we'd covered weeks earlier. Nic received an A in Torts and was clearly one of the top five students in his section.

Over the past several months, Nic has worked for me as a research assistant on an empirical project examining products liability claims against the manufacturers of medical devices. His work has consistently exceeded my high expectations for my student research assistants. Nic quickly devoured the background material I provided him on FDA regulation of medical devices and on the various theories of liability that plaintiffs may advance in these cases. Because the project focuses on courts' use of comment k to Section 402A of the Restatement (Second) of Torts, Nic has had to develop a deep understanding comment k and the exemption it provides from strict liability for unavoidably unsafe products. Nic's main role has been to read, analyze, and code over two-hundred medical device products liability cases. This work requires a careful reading of the cases and an ability to draw inferences about how a court would apply comment k in other cases. In his work, Nic has shown great attention to detail, solid judgment in drawing inferences, and the ability to defend his positions.

Finally, for all of Nics's obvious strengths, his demeanor has always been professional and respectful. He is soft-spoken and perhaps a bit too deferential (at first) to authority, although as he has become more confident in his ability to read and analyze cases he has been willing to challenge me and his student RA colleague when he believes we are in error. Nic also has an understated sense of humor, which makes him a pleasure to interact with.

I strongly recommend that you consider Nicholas for a clerkship. If I can provide any information that might be helpful, please don't hesitate to contact me.

Best Regards,

George Horvath, MD, JD
Assistant Professor of Law
University of Akron School of Law
McDowell Commons Room 230
Email: ghorvath@uakron.edu
Phone: (510) 325-4052

May 26, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Nicolas Oehler has requested that I write a letter of recommendation in support of his application to serve as a law clerk. I am pleased to recommend him for the position.

I first met Nicolas when he enrolled in my Civil Practice Clinic in the spring of 2023. During his time in the clinic, Nicolas assisted low-income clients with housing issues. These cases were referred to our clinic by Community Legal Aid Services. The clients often came to the clinic in a time of crisis.

Nicolas responded well to his clients and the pressures of the crises they faced. He was adept at interviewing clients and identifying their legal issues. He did this with great compassion for the clients. I found his work to be thorough and responsive to the needs of the client.

Nicolas's work in his court case was particularly noteworthy. He independently researched the court rules and prepared all of the necessary court filings. He prepared an outstanding trial notebook for the hearing. He worked well with the client to prepare her for the hearing and did a very nice job presenting her case at the hearing. The magistrate presiding over the case complimented him on his presentation. The client would not have had the successful outcome of her case without Nicolas's advocacy.

I would not hesitate to recommend Nicolas for a clerkship based on his excellent work in the Civil Practice Clinic. I believe Nicolas possesses the character, intellect, and energy to be an excellent judicial law clerk. He is bright, well-organized, and possesses good research skills. His professional demeanor and positive attitude will be an asset in your chambers.

Please do not hesitate to contact me, if you have any additional questions about Nicolas's qualifications to serve as a law clerk.

Sincerely yours,

Joann Sahl
C. Blake McDowell Professor of Law
Director, Civil Practice Clinic
University of Akron School of Law
Akron, Ohio 44325
330-972-7189
Jsahl1@uakron.edu

Nicolas C. Oehler

nicoehler13@gmail.com
(419) 631-8350
1246 Garman Rd
Akron, OH 44313

The following is a draft of an Order granting in part and denying in part a Motion for Judgement on the Pleadings that I wrote while working as a judicial extern in the chambers of Judge John R. Adams of the U.S. District Court for the Northern District of Ohio. The court never issued this Motion because the parties settled the matter; as such, this document has been redacted to protect the identity of the parties, remove sensitive and identifying information, and preserve confidentiality. This draft is shared with the permission of Judge Adams.

My student note, "*The Scrivener's Error: How Bankruptcy Judges Overrule Health Experts on Medicare Decisions,*" which was published in volume 56 of the *Akron Law Review*, is available as an additional writing sample upon request, along with writing samples from my work from other positions, as a law student, and as a judicial extern.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[redacted]	)	[redacted]
	)	
Plaintiff,	)	JUDGE JOHN R. ADAMS
	)	
vs.	)	
	)	
[redacted]	)	**MEMORANDUM OF OPINION AND ORDER**
	)	
Defendants.	)	
	)	[redacted]
	)	

This matter comes before the Court on a motion for judgment on the pleadings filed by Defendant [redacted]. Plaintiff [redacted] has opposed the motion, and [redacted] has replied. Accordingly, the motion for judgment on the pleadings [redacted] is GRANTED in part and DENIED in part.

I. Standard

Fed. R. Civ.P. 12(c) provides that "[a]fter the pleadings are closed -- but early enough not to delay trial -- a party may move for judgment on the pleadings." The standard for evaluating a motion for judgment on the pleadings is the same as that applicable to a motion to dismiss under Rule 12(b)(6) for failure to state a claim. *Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509, 511-12 (6th Cir. 2001). The Erie Doctrine dictates "that in diversity cases, federal courts must apply the substantive law of the state's highest court. If the state's highest court has not spoken sufficiently to establish a clear rule of law, then it is the responsibility of the federal court to 'ascertain from all the available data what the state law is and apply it.'" *ACME Roll Forming Co. v. Home Ins. Co.*, 31 F. App'x 866, 870 (6th Cir. 2002) (citation omitted). The Sixth Circuit stated the standard

for reviewing such a motion to dismiss in *Assn. of Cleveland Fire Fighters v. Cleveland*, 502 F.3d 545 (6th Cir. 2007) as follows:

> The Supreme Court has recently clarified the law with respect to what a plaintiff must plead in order to survive a Rule 12(b)(6) motion. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The Court stated that "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65 (citations and quotation marks omitted). Additionally, the Court emphasized that even though a complaint need not contain "detailed" factual allegations, its "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Id.* (internal citation and quotation marks omitted). In so holding, the Court disavowed the oft-quoted Rule 12(b)(6) standard of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (recognizing "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"), characterizing that rule as one "best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Twombly*, 550 U.S. at 563.

Id. at 548.

If an allegation is capable of more than one inference, this Court must construe it in the plaintiff's favor. *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995) (citing *Allard v. Weitzman*, 991 F.2d 1236, 1240 (6th Cir. 1993)). This Court may not grant a Rule 12(b)(6) motion merely because it may not believe the plaintiff's factual allegations. *Id*. Although this is a liberal standard of review, the plaintiff still must do more than merely assert bare legal conclusions. *Id.* Specifically, the complaint must contain "either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988) (quotations and emphasis omitted).

II. Facts

[redacted], [redacted], and [redacted], collectively known as the Team, formed the Teaming Agreement to perform construction services for [redacted]'s Project. [redacted]. If [redacted]

awarded the Team the contract to work on the Project, the Team agreed to form a joint venture. [redacted].

The Team engaged in the qualification and proposal process, and [redacted] sent an *Intent to Award* to the Team. [redacted]. After the Team received the *Intent to Award*, [redacted] and [redacted] formed a joint venture known as [redacted]. [redacted]. The *Intent to Award* Provides that the Team submit a technical proposal and not proceed with any work until the fully executed contract. [redacted], [redacted] performed preconstruction services for [redacted]. [redacted]. [redacted] formed a Construction Manager at Risk agreement with [redacted] for the Project. [redacted]. Accordingly, due to other complications on projects, [redacted] requested that [redacted] remove [redacted] from the Team at some point, but [redacted] sent the *Intent to Award* to the Team. [redacted]. Finally, [redacted] executed a Construction Management Agreement with [redacted] without [redacted]. [redacted]. Additionally, during this time, [redacted] solicited a [redacted] employee. [redacted]. [redacted], [redacted], [redacted], [redacted] are collectively the Defendants.

III. Breach of Contract

[redacted] alleges breach of contract. Defendants argue that [redacted] was insufficient in pleading damages; however, [redacted] sufficiently pleads all elements of the breach of contract claim. To maintain a breach of contract, a party must establish: (1) a contract existed; (2) the plaintiff performed; (3) the defendant breached; and (4) the plaintiff suffered damages. *Thomas v. Publishers Clearing House, Inc.*, 29 F. App'x 319, 322 (6th Cir. 2002) (citing *Doner v. Snapp*, 98 Ohio App.3d 597 (Ct. App. 1994)). The uncertainty of the existence of damages precludes recovery, not the uncertainty of the amount. *Stepka v. McCormack*, 66 N.E.3d 32, 45 (Ohio Ct. App. 2016); *Woehler v. Brandenburg*, No. CA2011–12–082, 2012 WL 5844730, at *35 (Ohio

Ct. App. 2012); *Allied Erecting & Dismantling Co., Inc. v. Youngstown*, 783 N.E.2d 523, 535 (Ohio Ct. App. 2002). Thus, if the party pleads the existence of the damages, then the party may proceed through discovery to address specifics about the damages. *Total Quality Logistics, LLC v. EDA Logistics*, No. 1:21-CV-164, 2021 WL 1964699, at *5 (S.D. Ohio May 17, 2021).

Here, the parties contracted to form the Teaming Agreement with the intent to bid on the [redacted] project and to form a joint venture if awarded the Project. According to the pleadings, [redacted] upheld its contractual agreement during the pre-proposal phase of the agreement. [redacted] met the pleading standard by stating that Defendants breached the agreement by forming a joint venture and wrongfully excluding [redacted]. Furthermore, after the joint venture's formation, the joint venture accepted the [redacted] contract and wrongfully excluded [redacted] from the joint venture that the Team contemplated in the Teaming Agreement. Finally, [redacted] sufficiently pleads damages, both in the solicitation clause and by the breach of the Teaming Agreement. [redacted] does not need to plead the specifics of damages, but only the existence of damages. Therefore, [redacted] is successful in pleading breach of contract.

A. The Doctrines of Impossibility and Impracticability

The Defendants argue impossibility and impracticability due to [redacted]'s refusal to go forward with the Project. The timeline of [redacted]'s refusal to proceed with the Project is unclear; therefore, the claim moves to discovery. The doctrines of impossibility and impracticability due to government action are closely related, and both excuse performance due to government action when the government action renders the contracted performance impracticable. *Glickman v. Coakley*, 22 Ohio App. 3d 49, 53 (Ct. App. 1984); *Bank One, Marion v. Marion, Ohio, Internal Med. Inc.*, No. 9-96-69, 1997 WL 176140, at *4 (Ohio Ct. App. 1997). The defense arises when an unforeseen event arises, and it is not the contracting party's fault. *Truetried Serv. Co. v.*

Hager, 118 Ohio App. 3d 78, 87 (Ohio Ct. App. 1997) (citing Calamari and Perillo, *Contracts* (1977), 476, Section 13); *London & Lancashire Indemn. Co. of Am. v. Bd. of Comm. of Columbiana Cty*., 107 Ohio St. 51, 64 (1923). As a matter of law, a court may dismiss the complaint if the undisputed facts conclusively establish an affirmative defense. *Est. of Barney v. PNC Bank, Nat. Ass'n*, 714 F.3d 920, 926 (6th Cir. 2013) (citing *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 613 (6th Cir. 2009); *In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12,16 (1st Cir. 2003)).

Both the doctrines of impossibility and impracticability may be applicable, and as an affirmative defense, the Court could dismiss the claim at the pleading stage. However, the impossibility or impracticability timeline is not established in the motion for judgment on the pleadings [redacted] and the reply [redacted]. It is unclear when [redacted] requested the Team to remove [redacted] from the Team. [redacted] intended to award the Team the Project, and the Team went forward with preparing the proposal. Yet, [redacted] and [redacted] formed a joint venture without [redacted] and later excluded [redacted] from the Project. Therefore, this matter should proceed through discovery.

IV. Tortious Interference

[redacted] pleads tortious interference with contract by [redacted] and [redacted]. [redacted] pleads that Defendants had knowledge of the Teaming agreement, but Defendants argue that an outside party must tortiously interfere, not the party to the contract themselves. Additionally, the Defendants argue that [redacted] procured the contracts breach, but this relies on impossibility and impracticability, which will proceed to discovery. Due to [redacted]'s refusal to go forward with the Project, the Defendants claim they were justified in removing [redacted] from the Project. [redacted] did not successfully plead this claim. Moreover, [redacted] pleads for damages, including punitive damages. Since the claim is dismissed, the punitive damages will not move forward. To successfully plead tortious interference on a contract, a plaintiff must plead "(1) the existence of a contract,[1] (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) the lack of justification, and (5) resulting damages." *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St. 3d 415, 419 (1995).

A. The Wrongdoers are Inside Parties to the Teaming Agreement

Here, [redacted] argues that [redacted] and [redacted] were the outside parties that interfered with the Teaming Agreement. However, an action for tortious interference may only lie against an outside party of the contract. *Lundeen v. Smith-Hoke*, 2015-Ohio-5086, ¶ 42 (Ohio Ct. App. 2015) (citing *Pasqualetti v. Kia Motors Am., Inc.*, 663 F.Supp.2d 602 (N.D.Ohio 2009)(otherwise, the party would substitute tort law for contract law).

[1] The parties do not contest this element.

When forming the joint venture, [redacted], [redacted] and [redacted] were not tortiously interfering with the Teaming Agreement. [redacted] itself is the joint venture contemplated in the Teaming Agreement by the parties. If [redacted] tortiously interfered with the Teaming Agreement, then it would be substituting tort law for contract law. By the same reasoning, being the owner of [redacted], [redacted] acted through [redacted]; thus, if he tortiously interfered with the Teaming Agreement, he would breach the Teaming Agreement before tortiously interfering with the Teaming Agreement. Therefore, [redacted] cannot substitute its contract breach claim with a tort law claim.

B. Lack of Justification

[redacted] argues that Defendants lacked justification, whereas Defendants take the contrary view. The pleadings do not show a lack of justification. To adequately plead that the party was unjustified in interfering in the contract, the Court considers the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties. *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St. 3d 171, 179 (1999) (adopting *Restatement Second, Torts (1979), § 767*). Analyzing the justification factors and the pleadings, [redacted] did not establish that the Defendants were unjustified in removing [redacted] from the contract. [redacted] pleads facts that support Defendants' argument that Defendants had to drop [redacted] from the Project or face losing the Project from [redacted]. Therefore, [redacted] did not show a lack of justification factors.

C. Procurement of Contract

Defendants claim they did not procure the contracture breach, but it was [redacted]. The Defendants' argument will proceed through discovery as it is based on the impracticability and impossibility defenses. As stated, the plaintiff must prove that the wrongdoer intentionally procured the contractual breach. *Kenty*, 72 Ohio St. 3d at 416. Although the Defendants' arguments of impracticability and impossibility due to [redacted]'s refusal to move forward with [redacted] will proceed to discovery, indeed, under the procurement analysis in tortious interference, Defendants themselves did not procure the contracture breach as they were parties of the contract. Moreover, as alleged, [redacted]'s business relationship with [redacted] was declining, and [redacted] did not want to go forward with the Project if [redacted] was a part of it. Therefore, under a tortious interference analysis, Defendants did not procure the breach.

D. Resulting Damages

[redacted] pleads for damages, including punitive damages. The Court dismisses the tortious interference claim, and it is the only claim pleaded that will receive punitive damages. A plaintiff must plead that the tortious interference resulted in damages. *Kenty*, 72 Ohio St. 3d at 416. A plaintiff may collect punitive damages for tortious interference; however, although [redacted] pleaded damages successfully, this action is dismissed from the complaint and is the only action pleaded that the plaintiff may collect punitive damages. *Devs. Three v. Nationwide Ins. Co.*, 64 Ohio App. 3d 794, 805 (Ct. App. 1990).

V. Unjust Enrichment

[redacted] pleads unjust enrichment and is successful in stating their claim. To successfully plead an unjust enrichment claim, the plaintiff must: (1) confer a benefit onto the defendant; (2) the defendant must know of the benefit; and (3) to allow the defendant to retain the benefit under the circumstances would be unjust without compensation to the plaintiff. *Patel v. Krushna SS*

L.L.C., 106 N.E.3d 169, 176 (Ohio Ct. App. 2018); *Barrow v. Village of New Miami*, 104 N.E.3d 814, 818 (Ohio Ct. App. 2018); *Pipino v. Norman*, 101 N.E.3d 597, 611 (Ohio Ct. App. 2017); *M.S. v. Toth*, 97 N.E.3d 1206, 1215 (Ohio Ct. App. 2017).

[redacted] conferred a benefit on the Defendants by providing preconstruction services. It is uncontested that the Defendants knew that [redacted] was providing these services. The parties actively worked and communicated to form the proposal. [redacted] sent invoices to the Defendants and ultimately chose to exclude [redacted]. By excluding them from the Project and without compensating [redacted], the Defendants were unjustly enriched under these circumstances. Therefore, [redacted] adequately pleads the elements for the unjust enrichment claim.

A. Written Contract

Defendants argue that [redacted] cannot claim unjust enrichment because a written contract governed the parties' relationship. It is permissible for [redacted] to claim alternative claims, thus the unjust enrichment claim is not dismissed. A quasi-contract claim cannot be upheld if there is an existing express contract; however, a party may plead alternative claims and bring a claim for unjust enrichment. *ArcelorMittal Cleveland, Inc. v. Jewell Coke Co., L.P.*, 750 F. Supp. 2d 839, 849 (N.D. Ohio 2010); *see Oldnar Corp. v. Panasonic Corp. of N. Am.*, 766 F. App'x 255, 265-66 (6th Cir. 2019) (a party may bring an unjust enrichment claim if the express contract is no longer in force).

Indeed, an unjust enrichment claim cannot be upheld if an existing express contract exists. However, [redacted] claimed unjust enrichment as an alternative claim. If the Teaming Agreement is no longer in force, [redacted] can bring an unjust enrichment claim. Thus, if the Defendants continue to enrich themselves at [redacted]'s expense, [redacted] is entitled to damages.

B. Bad Faith Exception

Defendants argue unjust enrichment requires bad faith; however, this is not true. Thus, [redacted]'s unjust enrichment claim is not dismissed. In general, an unjust enrichment action does not require bad faith. *FedEx Corporate Services, Inc. v. Heat Surge, LLC*, 131 N.E.3d 397, 402 (Ohio Ct. App. 2019). In some cases, unless there is fraud, illegality, or bad faith, a plaintiff cannot recover if the defendant retains the benefits from the agreement between the parties depending on the nature of the contractual agreement. *Eyerman v. Mary Kay Cosms., Inc.*, 967 F.2d 213, 222 (6th Cir. 1992) (citing *Aultman Hosp. Ass'n v. Community Mut. Ins. Co.*, 544 N.E.2d 920, 924 (Ohio 1989); *Ullmann v. May*, 72 N.E.2d 63, 67 (Ohio 1947)). In *Eyerman*, the plaintiff's damages arose from the contract, where she contracted the right to her commissions away, which is why the court ruled that unless there was no bad faith at the time of contracting, she could not claim unjust enrichment. 967 F.2d at 222.

Contrary to the Defendants' view, fraud, illegality, or bad faith is not necessary for an unjust enrichment claim. This exception is only applicable in some cases where the plaintiff has contracted away a right and there is fraud, illegality, or bad faith at the time of contracting. Here, [redacted] differs from the plaintiff in *Eyerman* because [redacted] claims unjust enrichment from the benefits it gave to the Defendants not arising from the Teaming Agreement. Once the Teaming Agreement was no longer in force, and the Defendants continued to enrich themselves at [redacted]'s expense, the bad faith exception would no longer apply because there is no contractual agreement controlling the benefits that [redacted] supplied to the Defendants.

C. Retention of Benefits

Defendants argue that they did not retain any benefits from [redacted], and each party was responsible for their own cost. Yet, [redacted] is entitled to alternative pleadings; thus, if the Teaming Agreement ended, then they have sufficiently pleaded the elements for an unjust

enrichment claim. Unjust enrichment is when a party "has and retains money or benefits which in justice and equity belong to another" *Johnson v. Microsoft Corp.*, 106 Ohio St. 3d 278, 286, (2005) (quoting *Hummel v. Hummel*, 133 Ohio St. 520, 528 (1938)).

Again, if the Teaming Agreement is no longer in effect, then the provisions that held each party to their own expenses would no longer apply. Here, [redacted] continued to provide preconstruction services to the Defendants throughout the proposal process until the Defendants removed [redacted] from the Project. At some point, the Teaming Agreement ended. The Defendants formed a joint venture without [redacted] to complete the Project. Nevertheless, the Defendants continued to retain the benefits of [redacted]'s preconstruction services. [redacted] sufficiently pleaded that the Defendants kept the benefits that [redacted] supplied to them.

D. Unconscionable Conduct and Superior Equity

Defendants claim that there was no unconscionable conduct that placed them in a position of superior equity. On the contrary, [redacted] pleaded sufficient facts to show that Defendants' conduct rose to such a level, and by retaining [redacted]'s services, they are now in a position of superior equity. To prevail on the unjust enrichment claim, it is true that the plaintiff must prove unconscionable conduct and superior equity by the defendants. *Andersons, Inc. v. Consol, Inc.*, 348 F.3d 496, 502 (6th Cir. 2003) (quoting *Katz v. Banning*, 84 Ohio App.3d 543, 552 (Ohio Ct. App. 1992)); *see also Chesnut v. Progressive Cas. Ins. Co.*, 166 Ohio App. 3d 299, 309 (Ct. App. 2006); *City of Cincinnati v. Fox*, 49 N.E.2d 69, 73 (Ohio Ct. App. 1943) (Plaintiff must show the plaintiff conferred a benefit on the defendants that put them in a position of superior equity under the circumstances). Passive retention of benefits is enough to rise to the level of "unconscionable conduct." *F.D.I.C. v. Jeff Miller Stables*, 573 F.3d 289, 295 (6th Cir. 2009).

[redacted] successfully pleads unconscionable conduct and superior equity. [redacted] provided preconstruction services to the Defendants that enabled them to secure the award for the Project. [redacted] helped prepare the proposal, was a key contact with [redacted], and was never paid for any of these services for the Project. Therefore, the Defendants were placed in a position of superior equity by not compensating [redacted]. In addition, [redacted] pleads sufficient facts to show that Defendants' passive retention of benefits is enough to rise to unconscionable conduct because Defendants continued to retain the benefits of [redacted] without compensation after the Teaming Agreement terminated.

VI. Declaratory Judgment

[redacted] asks for the declaratory judgment that: (1) [redacted] did not breach the Teaming Agreement; (2) [redacted] and [redacted] breached the Teaming Agreement; and (3) that the Teaming Agreement was terminated. [redacted]'s declaratory judgment claims are dismissed. When considering declaratory judgment, courts consider the following factors:

> (1) whether the judgment would settle the controversy; (2)whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of 'procedural fencing' or 'to provide an arena for a race for res judicata'; (4) whether the use of a declaratory judgment action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and (5) whether there is an alternative remedy that is better or more effective.

World Shipping, Inc. v. RMTS, LLC, No. 1:12 CV 3036, 2013 WL 774503, at *4 (N.D. Ohio Feb. 22, 2013) (citing *Pakideh v. Ahadi*, 99 F.Supp.2d 805, 808 (E.D.Mich.2000); *Scottsdale Ins. Co. v. Roumph*, 211 F.3d 964, 968 (6th Cir.2000)).

Factors three and four would not be an issue in this case. Factors one, two, and five weigh in favor of dismissing the claim. Unlike [redacted]'s other claims in their complaint, which provide an award of damages, declaratory judgment would not settle

the controversy. Moreover, the declaratory judgment would not serve a more useful purpose than the other claims in the complaint. Finally, the other claims provide remedies that are both better and more effective at providing [redacted] with full and complete relief. Therefore, [redacted]'s claim for declaratory judgment is dismissed.

VII. Conclusion

For the reasons stated, Plaintiff's complaint met the pleading standards in part and did not meet the pleading standards in part. Therefore, the Defendants' motion for judgment on the pleadings is GRANTED in part and DENIED in part.

IT IS SO ORDERED.

_____
Date

_____
JUDGE JOHN R. ADAMS
UNITED STATES DISTRICT COURT

Applicant Details

First Name	**Solveig**
Middle Initial	**K**
Last Name	**Olson-Strom**
Citizenship Status	**U. S. Citizen**
Email Address	**solveig.olson-strom@yale.edu**
Address	**Address** Street **33 Lake Place** City **New Haven** State/Territory **Connecticut** Zip **06511** Country **United States**
Contact Phone Number	**4045794068**

Applicant Education

BA/BS From	**Pomona College**
Date of BA/BS	**May 2018**
JD/LLB From	**Yale Law School** **https://www.nalplawschools.org/content/OrganizationalSnapshots/OrgSnapshot_225.pdf**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/ Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Wishnie, Michael
michael.wishnie@yale.edu
_203_ 436-4780
Kalhan, Anil
anil.kalhan@aya.yale.edu
Jolls, Christine
christine.jolls@yale.edu
203-432-1958

This applicant has certified that all data entered in this profile and any application documents are true and correct.

33 Lake Place
New Haven, CT 06511

June 12, 2023

Hon. Juan R. Sanchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez,

I am a rising third-year student at Yale Law School writing to apply for a clerkship in your chambers for the 2024-2025 term. For personal reasons, I will be relocating to Philadelphia, and am therefore only applying to positions in the greater Philadelphia area. A clerkship with you would be immensely valuable in furthering my legal training and preparing me to pursue a career in public interest work in Philadelphia.

My academic and professional experiences have prepared me to be an asset to your chambers. Prior to law school, I completed a master's degree and published a book chapter with the Vice Chancellor of the Asian University for Women. During law school, I have been a research assistant for Professors Anil Kalhan and Aslı Ü. Bâli. My internship last summer and my clinical work have honed my legal research and writing skills through hands-on litigation experience.

I have attached my resume, transcript, and writing sample. Professors Michael Wishnie, Christine Jolls, and Anil Kalhan are also submitting letters of recommendation on my behalf. Thank you for your consideration, and I look forward to hearing from you soon.

Sincerely,

Solveig Olson-Strom

SOLVEIG OLSON–STROM

+1 404-579-4068
solveig.olson-strom@yale.edu
33 Lake Place, New Haven, CT 06511

EDUCATION

Yale Law School – New Haven, CT
Juris Doctor, expected graduation 2024
Activities: Graduate Student Writing Partner; American Constitution Society; National Lawyers Guild; Temporary Restraining Order Project; Rebellious Lawyering Conference 2023

University of Bologna – Ravenna, Italy
Master of Arts in Protection of Human Rights and International Cooperation, *con lode*, 2021

Pomona College – Claremont, CA
Bachelor of Arts in Linguistics and Cognitive Science, *cum laude*, 2018
Honors: Phi Beta Kappa, Pomona College Scholar (ranked in top 25% of class)
Study Abroad: Harbin Institute of Technology (Harbin, China), Spring 2017
Thesis: Semantics of the Yoruba Particle *o*

EXPERIENCE

Worker and Immigrant Rights Advocacy Clinic – New Haven, CT — January 2023-Present
Law Student Intern
Representing two families forcibly separated at the southern border in a Federal Tort Claims Act and Alien Tort Statute lawsuit. Collaborating with classmates and supervising professors on offensive and defensive discovery and motion practice. Conducting research for a local union organizing workers in New Haven.

Yale Law School – New Haven, CT — September 2022-May 2023
Research Assistant
Researched immigration exceptionalism in constitutional regimes for Professor Anil Kalhan. Researched the laws of war from a Third World Approaches to International Law perspective for Professor Aslı Ü. Bâli.

Yale International Refugee Assistance Project – New Haven, CT — September 2021-April 2023
Co-Director
Completed over 80 Humanitarian Parole applications with Afghan clients through a partnership with Integrated Refugee & Immigrant Services. Drafted materials for a Special Immigrant Visa applicant who was previously denied due to a finding of fraud. Coordinated Yale IRAP events and projects for the 2022-23 academic year.

Lowenstein International Human Rights Clinic – New Haven, CT — August 2022-January 2023
Law Student Intern
Conducted legal and factual research on children's rights in the context of military detention and special courts.

European Center for Constitutional and Human Rights – Berlin, Germany — June 2022-August 2022
Critical Legal Trainee, Migration Team
Researched factual and legal questions for cases at various stages of litigation at the European Court of Human Rights. Drafted a submission to the Court to support the implementation of a prior positive judgment.

Texas Civil Rights Project – New Haven, CT — September 2021-December 2021
Student Volunteer
Researched and wrote a memorandum on possible legal challenges to Customs and Border Protection's implementation of a new mobile app, CBP One.

Lowenstein Human Rights Project – New Haven, CT — September 2021-December 2021
Student Volunteer
Researched harms faced by Hondurans who have been deported from the United States or who have been denied the opportunity to present their case for asylum at the border.

International Rescue Committee – Baltimore, MD / Remote — May 2020—April 2021
Immigration Legal Services Intern
Worked with refugee clients to complete citizenship, permanent residence, and family reunification petitions.

Asian University for Women – Chittagong, Bangladesh August 2018—May 2019
Writing Center Coordinator; Research Assistant (from January 2019)

Coordinated of a team of twelve peer tutors and student assistants. Led the planning and execution of weekly workshops, organized and led staff training sessions, and tutored students in one-on-one consultations. Served as a research assistant to and wrote a book chapter with Professor Rao, published in the edited volume *Diversity and Inclusion in Global Higher Education*.

SCHOLARSHIP

With Nirmala Rao. "Higher Education for Women in Asia" In *Diversity and Inclusion in Global Higher Education: Lesson from Across Asia*, edited by Nancy W. Gleason and Catherine S. Sanger. Singapore: Palgrave Macmillan. 2020.

With Meredith Landman. "Discourse particles in Yoruba: A verum analysis of sentence-final *o*." Paper presented at the *49th Annual Conference on African Linguistics*. Michigan State University, March 22–25, 2018.

LANGUAGES

German (Near-native), **Mandarin** (Advanced), **Spanish** (Advanced), **Italian** (Intermediate)

PERSONAL INTERESTS

Enjoy hiking, traveling, learning film photography, and following Premier League soccer.

YALE LAW SCHOOL

Office of the Registrar

TRANSCRIPT RECORD

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Candidate for : Juris Doctor MAY-2024

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Fall 2021					
LAW	10001	Constitutional Law I:Section A	4.00	CR	J. Driver
LAW	11001	Contracts I: Group 3	4.00	CR	Y. Listokin
LAW	12001	Procedure I: Section B	4.00	CR	J. Suk
LAW	14001	Criminal Law & Admin I: Sect A	4.00	CR	F. Doherty
		Term Units 16.00	Cum Units 16.00		
Spring 2022					
CHNS	159	Advanced Modern Chinese III	2.00	CR	N. Liang
LAW	21136	Employment and Labor Law	3.00	H	C. Jolls
		Substantial Paper			
LAW	21601	Administrative Law	4.00	H	N. Parrillo
LAW	21710	Legal Writing II	2.00	H	N. Messing
LAW	50100	RdgGrp: Law & Humanities	1.00	CR	R. Siegel
		Term Units 12.00	Cum Units 28.00		
Fall 2022					
LAW	20429	Race, Inequality, Law: DirRes	3.00	H	M. Bell
LAW	20557	Torts and Regulation	3.00	H	D. Kysar
LAW	20611	Immigration Law	4.00	P	A. Kalhan
LAW	30173	LowensteinIntl HumanRts Clinic	4.00	H	J. Silk, K. Beckerle, H. Metcalf
LAW	50100	RdgGrp:Law&LiberationMovements	1.00	CR	M. Bell
		Term Units 15.00	Cum Units 43.00		
Spring 2023					
LAW	21050	Federal Income Taxation	4.00	H	A. Alstott
LAW	30127	Worker&ImmigrantRightsClinic	3.00	H	M. Ahmad, K. Tumlin, M. Wishnie, K. Tyrrell
LAW	30128	Worker&ImmigrantRts:Fieldwork	2.00	H	M. Ahmad, K. Tumlin, M. Wishnie, K. Tyrrell
LAW	50100	RdgGrp: Movement Lawyering	1.00	CR	M. Ahmad
		Term Units 10.00	Cum Units 53.00		

IN PROGRESS WORK

Spring 2023					
LAW	21429	Race, Inequality, Law: DirRes	2.00		M. Bell
		In Progress Units 2.00			

********** END OF TRANSCRIPT **********

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YALE LAW SCHOOL
P.O. Box 208215
New Haven, CT 06520

EXPLANATION OF GRADING SYSTEM

Beginning September 2015 to date

HONORS	Performance in the course demonstrates superior mastery of the subject.
PASS	Successful performance in the course.
LOW **P**ASS	Performance in the course is below the level that on average is required for the award of a degree.
CREDIT	The course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses are offered only on a credit-fail basis.
FAILURE	No credit is given for the course.
CRG	Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
RC	Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
T	Ungraded transfer credit for work done at another law school.
TG	Transfer credit for work completed at another law school; counts toward graded unit requirement.
EXT	In-progress work for which an extension has been approved.
INC	Late work for which no extension has been approved.
NCR	No credit given because of late withdrawal from course or other reason noted in term comments.

Our current grading system does not allow the computation of grade point averages. Individual class rank is not computed. There is no required curve for grades in Yale Law School classes.

Classes matriculating September 1968 through September 1986 must have successfully completed 81 semester hours of credit for the J.D. (Juris Doctor) degree. Classes matriculating September 1987 through September 2004 must have successfully completed 82 credits for the J.D. degree. Classes matriculating September 2005 to date must have successfully completed 83 credits for the J.D. degree. A student must have completed 24 semester hours for the LL.M. (Master of Laws) degree and 27 semester hours for the M.S.L. (Master of Studies in Law) degree. The J.S.D. (Doctor of the Science of Law) degree is awarded upon approval of a thesis that is a substantial contribution to legal scholarship.

For Classes Matriculating 1843 through September 1950

80 through 100 = Excellent
73 through 79 = Good
65 through 72 = Satisfactory
55 through 64 = Lowest passing grade
0 through 54 = Failure

To graduate, a student must have attained a weighted grade of at least 65.

For Classes Matriculating September 1951 through September 1955

E = Excellent
G = Good
S = Satisfactory
F = Failure

To graduate, a student must have attained a weighted grade of at least Satisfactory.

For Classes Matriculating September 1956 through September 1958

A = Excellent
B = Superior
C = Satisfactory
D = Lowest passing grade
F = Failure

To graduate, a student must have attained a weighted grade of at least D.

From September 1959 through June 1968

A = Excellent
B+
B = Degrees of Superior
C+
C = Degrees of Satisfactory
C-
D = Lowest passing grade
F = Failure

To graduate a student must have attained a weighted grade of at least D.

From September 1968 through June 2015

H = Work done in this course is significantly superior to the average level of performance in the School.
P = Successful performance of the work in the course.
LP = Work done in the course is below the level of performance which on the average is required for the award of a degree.

CR = Grade which indicates that the course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses offered only on a credit-fail basis.
F = No credit is given for the course.

RC = Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
EXT = In-progress work for which an extension has been approved.
INC = Late work for which no extension has been approved.
NCR = No credit given for late withdrawal from course or for reasons noted in term comments.

CRG = Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
T = Ungraded transfer credit for work done at another law school.
TG = Transfer credit for work completed at another law school; counts toward graded unit requirement.
*Provisional grade.

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in enthusiastic support of the application of Solveig Olson-Strom, a rising third-year student at Yale Law School, for a clerkship in your chambers. Solveig earned her B.A. cum laude in Linguistics and Cognitive Science at Pomona College, where she was also selected for Phi Beta Kappa, and an M.A. in Protection of Human Rights and International Cooperation at the University of Bologna, Italy. At Yale, Solveig is an RA to two faculty, a leader of multiple student organizations, and successful student in two demanding clinics. She is smart, poised, organized, and reflective. I am delighted to recommend her to you.

In spring 2023, as a second-year student, Solveig joined the Worker & Immigrant Rights Advocacy Clinic. In one matter, she has represented two children who were separated from their parents in 2018 and brought to Connecticut, while their asylum-seeking parents remained in detention at the Texas border. Earlier students had won an order to reunite each child with each parent, J.S.R. by and through J.S.G. v. Sessions, 330 F.Supp.3d 731 (D.Conn. 2018), prompting their release and resettlement in Connecticut, and had filed administrative claims under the Federal Tort Claims Act (FTCA). When nation-wide negotiations to settle the tort claims of separated families broke down in late 2021, we had no choice but to proceed to litigation. See Flores Benitez v. Miller, No. 3:22-cv-00884-JCH (D.Conn.). I assigned Solveig to the case just after briefing on the government's motion to dismiss had been completed.

Over the course of the past semester, Solveig dived into the case. She learned the substantive and procedural law, the procedural history, and the facts related to each of her four clients (two households). The Court had authorized limited discovery during the pendency of the motion to dismiss, and this became the focus of Solveig's work. She helped to draft and serve interrogatories and requests for production on the government, as well as Rule 26(a)(1) initial disclosures by her clients. She consulted with lawyers handling other family separation cases around the county to identify categories of expert witnesses and then specific experts for those areas we decided to pursue, eventually interviewing and then negotiating retainers with several. She drafted multiple status reports and a discovery motion to the court. Solveig also helped to organize an enormous document dump by the government, supervising discovery attorneys at our co-counsel, the law firm of Jenner & Block, in reviewing hundreds of thousands of pages. It was quite an extraordinary amount of work for a 2L, working on her first complex federal litigation matter, in her first term in the clinic. And Solveig was terrific: unfazed by the many strands of the case and many individuals involved, she quietly mastered it all, guiding a large team of students forward and keeping the case on track. When called upon, she deployed her strong research and writing skills, and was a wonderful team member and collaborator throughout.

In a second matter in the clinic, which I did not supervise directly, Solveig and a different team of students represented UNITE HERE Local 217, a union of hotel and hospitality workers in Connecticut, on a series of organizing initiatives and workplace complaints. I understand from my colleague that her work on this matter was also very strong.

Solveig is wonderful. She is smart, thoughtful, and kind. She can complete enormous amounts of work with swiftness and care. She is well-liked by her clients, classmates, and supervisors. She will be an outstanding law clerk.

Sincerely,

/s/ Michael J. Wishnie

Michael J. Wishnie

Michael Wishnie - michael.wishnie@yale.edu - _203_ 436-4780

June 01, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

RE: Recommendation for Solveig Olson-Strom

Dear Judge Sanchez:

I am delighted to give my highest recommendation in support of Solveig Olson-Strom, who was a student in my Immigration Law course during the Fall Semester 2022–23, when I was a Visiting Professor of Law at Yale Law School. She also has served as my research assistant throughout most of the past academic year. She is one of the strongest students with whom I have had occasion to work in my career, and I am highly confident that she possesses the intelligence, intellectual curiosity, analytical capacity, and writing ability, along with a high level of maturity, judgment, and professionalism, to thrive as a law clerk in your chambers.

In my Immigration Law course, Ms. Olson-Strom was a standout student in a large and unusually strong cohort. While immigration law can be a challenging and demanding subject area for many students, Ms. Olson-Strom exhibited both a strong command over the finer technical details of the field and a facility for engaging the larger normative questions that the subject area presents. She just missed receiving a grade of Honors for the course by the narrowest of margins—and only because her answer to one question on the final exam brought her overall score slightly below the threshold under the grade distribution required by the law school. On every other exam question, Ms. Olson-Strom performed at the very top of the class. As you will note from her resume and transcript, her overall record of achievement during law school has been very high. I have zero hesitation in saying that I regard her performance in Immigration Law to be entirely consistent with the rest of her academic record in law school, and virtually indistinguishable from some of the students who received grades of Honors in Immigration Law itself.

In class discussion and other conversations with me, Ms. Olson-Strom's thoughtful comments and questions were consistently excellent, demonstrating not only that she was well-prepared, but that she had reflected deeply upon the substantive issues in the course. While she was more reticent than other students in class discussion itself, the size of the class (over fifty students) did not always lend itself to wide or extensive participation, and I appreciated her emphasis on quality over quantity in class participation. Over the course of the semester, she also seemed to become more comfortable engaging in class discussion itself. To an extent much greater than other students, Ms. Olson-Strom made a point of reaching out to me individually to ask questions and discuss issues in the course during office hours—but never in a manner that felt gratuitous or purely instrumental.

Ms. Olson-Strom's work for me as a research assistant has been absolutely first rate. She has primarily provided assistance for my work on a project examining the constitutional principles governing immigration regulation and refugee protection in range of different countries. Given her previous experiences working on refugee protection and human rights issues in Europe, and her fluency in German, I assumed that the project would be within her wheelhouse. Her initial memo to me on the constitutional framework governing immigration in Germany did not disappoint: it was through, carefully prepared, clearly written, and exceedingly helpful. Germany, however, is a country with which Ms. Olson-Strom already had at least some basic familiarity from her previous experiences. When she has subsequently turned to examining issues arising in countries with which she had considerably less (if any) existing substantive familiarity, including South Africa and Canada, she has been a very quick study, getting up to speed on the basic foundations of the constitutional regimes in those countries, and the relevant scholarship and doctrinal principles, rapidly and to an extent that has allowed her to engage the materials she has found at a high level.

Working with Ms. Olson-Strom has been a terrific experience—I have had a significant number of research assistants at Yale over the past two years, and she has been one of the very best. When I first interviewed her to be my research assistant, I perceived her to be somewhat reserved and wondered whether she might be shy in our communications about her work. But that has turned out not to be the case at all. To the contrary, she has been warm, engaging, and proactive in communicating with me. While she has never hesitated to seek my guidance when necessary, she also has a been a self-starter and taken the initiative as necessary—for example, by reaching out to international law librarians for suggestions on how to hunt down German-language legal sources and other research guidance, and by extending her research beyond the specific questions I asked her to pursue in relevant and productive ways. Whether in writing or in meetings, she has communicated the results of her research and analysis with clarity, detail, rigor, and enthusiasm. I have greatly enjoyed our conversations about her research for me, her questions and comments about immigration law, and her academic and professional interests and aspirations. As you will perceive from her resume, her interests are wide-ranging, and her maturity and good judgment have been on full display in all of our interactions. I would hire her again in a heartbeat.

I have greatly enjoyed working with Ms. Olson-Strom as both a student and research assistant, and she has my highest recommendation. She would undoubtedly make valuable contributions to your work and flourish as a law clerk, and I recommend her with enormous enthusiasm and confidence. I appreciate your consideration and would be very happy to discuss her application with you further if it would be helpful.

Very truly yours,
Anil Kalhan

Anil Kalhan - anil.kalhan@aya.yale.edu

Professor of Law
Drexel University Kline School of Law

Visiting Professor of Law (Fall 2021–22)
Yale Law School

Anil Kalhan - anil.kalhan@aya.yale.edu

June 07, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Solveig Olson-Strom, an incredibly smart and utterly delightful Yale Law School student, for a clerkship in your chambers. I recommend Solveig, who plans a career in public interest law, to you with the greatest possible enthusiasm.

Solveig is applying exclusively to chambers in the greater Philadelphia area.

By way of background for this recommendation, I served as a law clerk myself both at the United States Court of Appeals for the District of Columbia Circuit and at the Supreme Court of the United States.

I met Solveig when she took Employment and Labor Law with me the spring of her first year of law school. Solveig was a fantastic student in the course. When I directed cold-call questions to her, she was always impeccably prepared and insightful in her responses. When we discussed her end-of-term paper, she was collaborative, deeply thoughtful, and an all-around pleasure. It was no surprise that the paper she produced was superb – consistent with her outstanding performance in other courses including Professor Parrillo's notoriously competitive Administrative Law course. Solveig's paper for Employment and Labor Law was not only substantively first-rate but also extremely well-written. In all, Solveig is an outstanding thinker, writer, and student.

As already suggested, Solveig is also absolutely lovely on a personal level, and I am sure she would get along well with others in chambers.

For all of these reasons, I recommend Solveig to you with the greatest possible enthusiasm, and I hope that you will not hesitate to contact me, or have anyone from your chambers contact me, at christine.jolls@yale.edu or 203-432-1958 if there is any additional information I might be able to provide in connection with your consideration of her application.

Sincerely,

Christine Jolls
Gordon Bradford Tweedy Professor
Yale Law School
christine.jolls@yale.edu
(203) 432-1958

WRITING SAMPLE

Solveig Olson-Strom
33 Lake Place
New Haven, CT 06511

I prepared the attached memorandum for my advanced legal writing class. This memorandum examined whether long-term pole camera surveillance violates the Fourth Amendment.

MEMORANDUM

TO: Jane Doe, Attorney, Federal Defenders of New York
FROM: Solveig Olson-Strom
DATE: May 30, 2022
RE: *United States v. Crain:* Costs and benefits of filing a motion to suppress

I. Question Presented

This memorandum evaluates the potential outcomes of filing a motion to suppress two clips of surveillance footage that allegedly link our client, Andrew Crain, to an armed bank robbery on March 10, 2020. The footage was obtained by a video-camera that recorded the outside of Mr. Crain's home for fifteen months from a nearby telephone pole. The government did not obtain a warrant at any point. Thus, this memorandum evaluates (1) whether this pole camera surveillance violates the Fourth Amendment's prohibition on unreasonable searches, and (2) if it does, whether the judge presiding over Mr. Crain's trial is likely to suppress the two video-clips.

II. Short Answer

Though the authorities are split on this issue, the court would likely find that the government's pole camera surveillance of Mr. Crain for fifteen months does not violate the Fourth Amendment. Furthermore, even if the court finds a constitutional violation, suppression is not automatic. The so-called "good faith" exception allows evidence obtained unlawfully so be admitted if law enforcement reasonably relied on existing precedent. The court would likely find that the good faith exception applies in this case and that the surveillance footage is thus admissible as evidence. However, our office should still file a motion to suppress, in order to exhaust all possible options for our client.

III. Facts

On December 28, 2018, the Federal Bureau of Investigation (FBI) installed a video-camera on a publicly owned telephone pole outside Mr. Crain's home after linking him to a

wave of armed bank robberies. The FBI did not obtain a warrant. The camera observed the front of Mr. Crain's house and recorded continuously for fifteen months. Based primarily on the pole camera's surveillance footage, Mr. Crain was indicted for armed robbery of a federally insured bank on April 5, 2020. The case is now before Judge Serena Julien of the Southern District of New York (S.D.N.Y.).

The government seeks to introduce into evidence two video-clips taken by the pole camera on March 10, 2020. The first clip recorded Mr. Crain leaving his property with a shotgun at 7:38 AM ("Clip One"). The second clip recorded Mr. Crain returning home at 9:27 AM and revealed the area immediately inside his house as he walked in the front door ("Clip Two"). While Mr. Crain was away from his house, security camera footage at a branch of the Hongkong and Shanghai Banking Corporation (HSBC) bank in Manhattan recorded four individuals wearing gray masks exiting a white Cadillac Escalade and returning to it following the completion of a bank robbery. The white Cadillac Escalade in the bank footage matches the description of the car registered to Mr. Crain, as well as the car Mr. Crain is seen entering in Clip One and exiting in Clip Two.

After the indictment, our office began considering filing a motion to suppress Clip One and Clip Two on the grounds that the warrantless pole camera surveillance of Mr. Crain's home violates the Fourth Amendment. Our office has already determined that the HSBC security camera footage is uncontestable.

IV. Discussion

This section first describes the relevant legal standard for what constitutes a Fourth Amendment search. Second, it suggests that, while the issue of whether pole camera surveillance is a search is unclear, the court would likely deny a motion to suppress either way because the FBI can rely on the so-called good faith doctrine, which applies when law

enforcement acted based on existing precedent. Third, it explains strategic reasons to file such a motion regardless.

a. Fourth Amendment Search Standard

The Fourth Amendment protects individuals from unreasonable searches and seizures, and the Supreme Court has stated that "[w]arrantless searches are presumptively unreasonable." *United States v. Karo*, 468 U.S. 705, 717 (1984). The key question is thus what constitutes a search. In *Katz v. United States*, the Supreme Court recognized that searches can be electronic as well as physical and held that a search occurs when the government intrudes in a place where someone has a "reasonable expectation of privacy." 389 U.S. 347, 360 (1967) (Harlan, J., concurring). *Katz* also established a two-part test. *Id* at 361. Under the *Katz* test, Mr. Crain would have to show both that he had an "actual (subjective) expectation of privacy" and that this expectation was "one that society is prepared to recognize as 'reasonable.'" *Id*.

The Supreme Court has stated that "the home is first among equals" for Fourth Amendment purposes. *Florida v. Jardines*, 569 U.S. 1, 6 (2013). Furthermore, the area "immediately surrounding and associated with the home" is considered "part of the home itself." *Id* (quoting *Oliver v. United States*, 466 U.S. 170, 180). However, this does not mean that law enforcement officers must "shield their eyes when passing by a home" on a public street or sidewalk. *Cal. v. Ciraolo*, 476 U.S. 207, 213 (1986). There is no reasonable expectation of privacy for what one "knowingly exposes to the public." *Katz*, 389 U.S. at 351. In *Ciraolo*, the Supreme Court held that a police officer could observe a fenced-in backyard from an airplane without obtaining a warrant. Furthermore, law enforcement officers are authorized to "augment" their "sensory faculties" using technology. *United States v. Knotts*, 460 U.S. 276, 282 (1983).

b. Admissibility of Pole Camera Footage

This section analyzes whether footage obtained via warrantless pole camera surveillance is admissible as evidence. It first examines whether the government's surveillance

of Mr. Crain violated the Fourth Amendment, concluding that the court would probably find it did not, though the issue is close to the line. It then explains that even if the court found a Fourth Amendment violation, the two clips may still be admissible due to the good faith exception.

i. Pole Camera Surveillance Under the Fourth Amendment

The government's use of a pole camera without a valid warrant to obtain Clip One and Clip Two likely does not violate the Fourth Amendment. However, courts are divided on this issue, so the outcome is uncertain. The specific issue of pole cameras has not been addressed by the Supreme Court or the Second Circuit. It has, however, arisen in the court in which Crain is being prosecuted, namely S.D.N.Y. In 2017, S.D.N.Y. Judge Katherine Forrest held that the continuous, long-term use of pole cameras is not a Fourth Amendment search. *United States v. Mazzara*, 2017 WL 4862793, *12 (S.D.N.Y. 2017). In *Mazzara*, law enforcement installed a pole camera, without obtaining a warrant, and recorded the outside of the defendant's residence and driveway for twenty-one months. *Id* at 4. The court agreed the defendant had manifested a subjective expectation of privacy by erecting a fence around his property, satisfying the first prong of the *Katz* test. *Id* at 24-25. However, noting that "society has come to expect a significant level of video surveillance," the court held that the pole camera use did not violate "any expectation of privacy that modern society is prepared to recognize as reasonable." *Id* at 31, 35. The facts of *Mazzara* clearly map on to the facts of this case. In both instances, the cameras were in place for over a year, and recorded only what would have been visible to passers-by. Overall, convincing Judge Julien to come to the opposite conclusion of another S.D.N.Y judge will likely be an uphill battle.

Though the Second Circuit has yet to specifically address warrantless pole camera surveillance, most circuits that have considered the issue have found no constitutional violation. In *United States v. Tuggle*, the Seventh Circuit held that eighteen months of video surveillance

from three pole cameras aimed at the defendant's home did not violate the Fourth Amendment. 4 F.4th 505, 529 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1107 (2022). The Sixth Circuit in *United States v. Houston* similarly held that ten weeks of pole camera surveillance did not violate the Fourth Amendment. 813 F.3d 282, 285 (2016). The *Houston* court stated that, even if it is impractical for law enforcement to conduct in-person surveillance for ten weeks, "it is only the possibility that a member of the public" could see the same activity "that is relevant for Fourth Amendment purposes." *Id* at 289. Conversely, the Fifth Circuit held that a court order was required for pole camera surveillance lasting approximately two months. *United States v. Cuevas-Sanchez*, 821 F.2d 248, 25 (1987). However, in *Cuevas-Sanchez*, the camera overlooked a ten-foot-tall fence in order to monitor the defendant's backyard. *Id* at 250. No circuit court has held that long-term pole camera surveillance of publicly visible areas constitutes a Fourth Amendment search.[1]

On the other hand, two state supreme courts have found that pole camera surveillance is a search under the Fourth Amendment. In *People v. Tafoya*, the Colorado Supreme Court emphasized the duration of the pole camera surveillance in holding that three months of continuous recording without a warrant was a constitutional violation. 2021 CO 62, P3. The Supreme Court of South Dakota came to a similar conclusion in *State v. Jones*, holding that two months of pole camera use without a warrant for two months to surveil defendant's residence violated the Fourth Amendment. 2017 SD 59, P43. In *Jones*, the court applied the *Katz* test to reach its conclusion. While the defendant may not have had a reasonable expectation of privacy for activity he conducted in public view outside his home, the court decided that he did have a reasonable expectation of privacy in the "whole of his movements." *Id* at P28. The court noted that long term surveillance "revealed the patterns of Jones's life"

[1] The First Circuit is currently considering this issue in its en banc rehearing of *United States v. Moore-Bush*. 2020 U.S. App. LEXIS 38858 (1st Cir., Dec. 9, 2020). The withdrawn opinion held that long-term pole camera surveillance did not constitute a Fourth Amendment search. *United States v. Moore-Bush*, 963 F.3d 29 (1st Cir., 2020), vacated. Oral argument took place on March 23, 2021, over a year ago, so a decision is likely imminent.

and that "unfettered use of surveillance technology" by the government "raises the specter of an Orwellian state." *Id* at P37. This is especially true when the duration of the pole camera use is even longer than the two months in *Jones*, such as the fifteen months of surveillance in Mr. Crain's case. Therefore, the court could find that the *Katz* test weights in Mr. Crain's favor. The facts of both *Tafoya* and *Jones* are very similar to those of the current case, except that the pole camera recorded Mr. Crain's home for a much longer period of time. These cases indicate that the issue of pole camera surveillance is not clear-cut under existing Supreme Court precedent.

The primary source of this split in authorities arises from differing interpretations of two relatively recent Supreme Court cases. In *United States v. Jones*, law enforcement placed a Global Positioning System (GPS) tracking device on the respondent's car, monitoring its every movement for four weeks. 565 U.S. 400, 403. In holding there was a constitutional violation, the majority declined to apply the *Katz* test, emphasizing instead the physical intrusion of the government installing a device on the respondent's car. *Id.* at 404. In *Carpenter v. United States*, the Supreme Court held that law enforcement's use of historical cell-site location information (CSLI) without a warrant violated the Fourth Amendment. 138 S. Ct. 2206, 2217 (2018). CSLI allows the government to create a complete picture of an individual's physical location and even go "back in time" by accessing the cell phone carrier's records. *Id* at 2210. Thus, courts that have held that pole camera surveillance is not a search often emphasize the difference between the location information at issue in *Jones* and *Carpenter* on one hand and stationary video surveillance on the other. *E.g.*, *Mazzara*, 2017 WL 4862793, at 34. Furthermore, dicta in *Carpenter* states that the court's holding "does not call into question conventional surveillance techniques…such as security cameras." 138 S. Ct. at 2210. Some courts find that pole cameras fall under the umbrella of security cameras, while others disagree. *Compare United States v. Moore-Bush*, 963 F.3d 29, 31 (1st Cir., 2020), vacated, *with People*

v. Tafoya, 490 P.3d 532, 540 (2019), aff'd, 2021 CO 62. Courts that have found a constitutional violation for pole camera use focus on the concerns in *Carpenter* and *Jones* regarding the duration and continuity of the CSLI and GPS tracking. *E.g.*, *Tafoya*, 2021 CO 62, P36. These two Supreme Court cases do not clearly determine the constitutional status of pole camera surveillance either way, contributing to the current split in authorities. Therefore, whether the court would decide that pole camera surveillance constitutes a Fourth Amendment search in Mr. Crain's case is uncertain, though it is slightly more likely that the court would find no constitutional violation.

ii. Good Faith Exception

However, even if the court finds that the pole camera investigation of Mr. Crain was conducted in violation of the Fourth Amendment, suppression of Clip One and Clip Two would not automatically follow. Though exclusion of unlawfully obtained evidence is the standard, there is one major exception. *Davis v. United States*, 564 U.S. 229, 231-32 (2011). If law enforcement officials collect evidence "in compliance with binding precedent that was later overruled," the exclusionary rule does not apply. *Id.* at 232. This is known as the "good faith" exception. *Jones*, 2017 SD at P44. The exclusionary rule exists as a deterrent to law enforcement, and when weighed against "the high cost to…the truth" of suppressing key evidence, should not be applied when its deterrent effect would be lost. *Davis*, 564 U.S. at 232. All courts that have reached the issue of whether the good faith exception applies to warrantless pole camera surveillance have found that it does. *E.g.*, *Jones*, 2017 SD at P48; *Mazzara*, 2017 WL 4862793 at 24. Furthermore, in cases in which the evidence was suppressed, the court found that the good faith exception claim had been waived because the government did not raise it early enough. *E.g.*, *Tafoya*, 490 P.3d at 542 n.5; *United States v. Moore-Bush*, 381 F. Supp. 3d 139, 142 n.2 (2019), rev'd, 963 F.3d 29 (2020), vacated, 982 F.3d 50 (2020). While there is no binding precedent in the Second Circuit that speaks directly to pole camera use, as

the *Mazzara* court observed, "there is no controlling precedent that holds the duration of otherwise lawful surveillance is of constitutional significance." 2017 WL 4862793 at 37. Therefore, the court will likely decide it was "objectively reasonable" for the FBI in Mr. Crain's case to believe it could lawfully surveil the outside of Mr. Crain's home without a warrant. *Id* at 36. Suppressing the contested evidence in this case would not strongly deter police misconduct because there was no reason for the FBI to think pole camera surveillance contravenes the Fourth Amendment. A motion to suppress Clip One and Clip Two would thus likely be denied.

c. Reasons to File a Motion to Suppress

This section offers three main reasons for filing a motion to suppress, even though it would likely be denied. First, there is no controlling precedent directly applicable to this issue, and the persuasive authorities are divided. Thus, it is possible that the court will find a constitutional violation. While it is unlikely the motion would then be approved, due to the good faith exception, the government may fail to raise a good faith exception claim in a timely manner. The claim could thus be waived. Furthermore, it is important to exhaust all possible avenues in defense of our client. Clip One and Clip Two appear to directly link Mr. Crain to the alleged bank robbery, and if they are admitted, it will be difficult to win this case. Second, Judge Julien has indicated in past cases her commitment to rigorously protecting civil liberties. Thus, it is possible she would be more likely to find a constitutional violation than Judge Forrest, who authored the *Mazzara* opinion. Third and finally, while there may be a concern that bringing up this issue in this case may create bad precedent for future cases, an extremely similar S.D.N.Y. case already exists in the form of *Mazzara*. Therefore, this concern is less significant than it otherwise might be, and is outweighed by the other factors outlined above. For these reasons, our office should move forward with filing a motion to suppress Clip One and Clip Two.

V. Conclusion

The issue of whether long-term pole camera surveillance without a warrant violates the Fourth Amendment has divided courts in recent years. Therefore, it is not clear whether the court would consider the FBI's use of a pole camera to investigate Mr. Crain a search. However, it is slightly more likely that the court will not find a constitutional violation, in line with a very similar S.D.N.Y. case, *United States v. Mazzara*. Moreover, even if the court held that the surveillance of Mr. Crain's home was a search, Clip One and Clip Two would likely still be admissible, because the FBI acted in reasonable reliance on existing precedent. Despite the likelihood that a motion to suppress would be denied, our office should still file one. A motion to suppress would have the greatest potential to deliver a win for our client.

Applicant Details

First Name	**Eun Young**
Last Name	**Park**
Citizenship Status	**U. S. Citizen**
Email Address	**park2714@umn.edu**
Address	**Address** Street **51 Parc Place Drive** City **Milpitas** State/Territory **California** Zip **95035** Country **United States**
Contact Phone Number	**4082092575**

Applicant Education

BA/BS From	**University of Michigan-Ann Arbor**
Date of BA/BS	**April 2018**
JD/LLB From	**University of Minnesota Law School** **http://www.law.umn.edu**
Date of JD/LLB	**May 11, 2024**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Minnesota Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**McGee National Civil Rights Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience **Immigration**

Recommenders

Bentley, Elizabeth
ebentley@umn.edu
612-625-7809
Rozenshtein, Alan
azr@umn.edu
Stevenson, Hon. Karen L.
KS_Chambers@cacd.uscourts.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

E. Isabel Park

511 S 4th St, Apt 312 · Minneapolis, MN 55415 | (408) 209-2575 | park2714@umn.edu

June 10, 2023

The Honorable Juan R. Sanchez
U.S. District Court for the Eastern District of Pennsylvania
14613 U.S. Courthouse, Courtroom 14-B
601 Market Street
Philadelphia, PA 19106

Dear Judge Sanchez:

I am a rising third-year student at the University of Minnesota Law School, and I would like to apply for a one-year position in your chambers for the 2024-2025 term. I am currently a Summer Associate at Latham & Watkins. I serve as Senior Articles Editor on the Minnesota Law Review, Student Director for the Civil Rights Appellate Clinic, and Student Instructor for the Legal Research and Writing program.

With this letter, you will find my résumé, law school transcript, and writing sample. Letters of recommendation will arrive separately from University of Minnesota Law School Professors Alan Rozenshtein, Elizabeth Bentley, and Judge Karen Stevenson.

Please let me know if I can supply anything else for your review. Thank you for your consideration.

Sincerely,

E. Isabel Park

E. Isabel Park

511 S 4th St, Apt 312 · Minneapolis, MN 55415 | (408) 209-2575 | park2714@umn.edu

EDUCATION

University of Minnesota Law School, Minneapolis, MN
J.D. Anticipated May 2024, GPA 3.765/4.333
Minnesota Law Review, Senior Articles Editor
Activities: McGee National Civil Rights Moot Court Competition (invitation only); Asylum Law Project, 1L Project Coordinator; Mid-Minnesota Legal Aid (Eviction Defense Project)
Other: Sidley 1L Summer Diversity Mentorship Program; MSBA Appellate Practice Section Mentorship Program

University of Michigan, Ann Arbor, MI
B.A., Honors Sociology, April 2018
Activities: Meteorite, Staff Editor (2017−18); Research Assistant to Professors Michael Barr and Margo Schlanger

EXPERIENCE

Latham & Watkins, Menlo Park, CA
Summer Associate, May 2023 – Present
Research and analyze federal and state securities law and draft research memos. Attend practice area trainings and meetings with attorneys to discuss case strategy.

Civil Rights Appellate Clinic, Minneapolis, MN
Certified Student Attorney/Student Director, December 2022 – Present
Conduct client interviews and legal research. Draft and cite-check briefs in state and federal appellate courts. Attend seminar sessions and moot arguments with appellate/Supreme Court practitioners. Help with clinic case selection. Prepare and manage case assignments and assist with clinic course curriculum development and refinement. Drafted client narratives for amicus brief in *Arizona v. Navajo Nation* (No. 21-1484). Attended oral arguments at the U.S. Supreme Court.

U.S. Attorney's Office (Civil Rights Enforcement Division), District of Minnesota, Minneapolis, MN
Legal Intern, August 2022 – December 2022
Drafted interview outlines, legal memoranda, and pleadings, including an ADA claim complaint. Revised and cite-checked work product. Observed and participated in client and community member interviews.

U.S. District Court for the Central District of California, Los Angeles, CA
Judicial Extern to Judge Karen Stevenson, May 2022 – July 2022
Conducted legal research and drafted bench memos. Prepared reports and recommendations in federal habeas cases involving *pro se* litigants and various minute orders. Observed trials and proceedings in judges' courtrooms.

Professor Alan Rozenshtein, University of Minnesota Law School, Minneapolis, MN
Research Assistant, January 2022 – Present
Conduct literature reviews on relevant legal, philosophical, and policy literature and the Fediverse, including its First Amendment and antitrust implications. Cite-check and edit draft papers.

Sidley Austin LLP, Chicago, IL
Project Assistant (Immigration and IP Litigation), June 2018 – June 2021
Drafted reference letters, USCIS and DOL forms, and compiled evidence for visa petitions. Facilitated green card process for 400+ immigrants. Prepared recruitment reports for government-issued PERM audits. Managed naturalization cases. Cite-checked and organized pleadings and exhibits for depositions and filings. Provided trial support by preparing witness examination outlines and binders. Filed pleadings through the U.S. Patent and Trademark Office's online filing system.

COMMUNITY SERVICE

Legal Services Corporation, *Assistant to Chairman of the Board of Directors (John Levi*)
Blind Services Association, *Creative Writing Instructor/Volunteer Reader*

INTERESTS

Language learning (Latin and French), classical piano, tennis, DJing, and singing (worship team, previously served in choir).

University of Minnesota Unofficial Transcript

Name : Park,Eun Young
Student ID : 5753023
Birthdate : 5 - 17

Print Date: 06/09/2023

MOST RECENT PROGRAMS

Campus : University of Minnesota, Twin Cities
Program : Law School
Plan : Law J D
Degree Sought : Juris Doctor

* * * * * **Beginning of Law Record** * * * * *

Fall Semester 2021
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6001	Contracts	4.00	4.00	B+	13.332
LAW	6002	Legal Research & Writing	2.00	2.00	P	0.000
LAW	6005	Torts	4.00	4.00	B	12.000
LAW	6006	Civil Procedure	4.00	4.00	A	16.000
LAW	6007	Constitutional Law	3.00	3.00	A-	11.001
TERM GPA :	3.489	TERM TOTALS :	17.00	17.00	15.00	52.333

Spring Semester 2022
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6002	Legal Research & Writing	2.00	2.00	P	0.000
LAW	6004	Property	4.00	4.00	A	16.000
LAW	6009	Criminal Law	3.00	3.00	A-	11.001
LAW	6013	Law in Practice: 1L	3.00	3.00	P	0.000
LAW	6018	Legislation and Regulation: 1L	3.00	3.00	A	12.000
TERM GPA :	3.900	TERM TOTALS :	15.00	15.00	10.00	39.001

Fall Semester 2022
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6152	Federal Jurisdiction	3.00	3.00	A-	11.001
LAW	6219	Evidence	3.00	3.00	A-	11.001
LAW	6918	Rule of Law	2.00	2.00	A	8.000
LAW	7003	Legal Research & Writing Instr	2.00	2.00	H	0.000
LAW	7102	Law Review: Research & Writing	1.00	1.00	P	0.000
LAW	7623	Public Interest Field Placemnt	3.00	3.00	H	0.000
TERM GPA :	3.750	TERM TOTALS :	14.00	14.00	8.00	30.002

Spring Semester 2023
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6661	PR - General	3.00	3.00	A-	11.001
LAW	6834	Federal Habeas Corpus	2.00	2.00	A	8.000
LAW	6839	Supreme Court	2.00	2.00	A	8.000
LAW	7003	Legal Research & Writing Instr	2.00	2.00	H	0.000
LAW	7102	Law Review: Research & Writing	1.00	1.00	P	0.000
LAW	7678	CL: Civil Rights Appellate	4.00	4.00	A+	17.332
TERM GPA :	4.030	TERM TOTALS :	14.00	14.00	11.00	44.333

Fall Semester 2023
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6081	Constitutional Law: 14th Amend	3.00	0.00		0.000
LAW	6085	Criminal Procedure: Investigtn	3.00	0.00		0.000
LAW	6915	Race and the Law	2.00	0.00		0.000
LAW	7005	Senior Legal Rsch & Wrtng Inst	2.00	0.00		0.000
LAW	7097	McGee Civ Rts Mt Ct Comp Team	1.00	0.00		0.000
LAW	7100	Law Review Editors	2.00	0.00		0.000
LAW	7679	CL: Civil Rights Applit Dir	2.00	0.00		0.000
TERM GPA :	0.000	TERM TOTALS :	15.00	0.00	0.00	0.000

Law Career Totals

CUM GPA:	3.765	UM TOTALS:	75.00	60.00	44.00	165.669
		UM + TRANSFER TOTALS:		60.00		

***** End of Transcript *****

UNIVERSITY OF MINNESOTA

Twin Cities Campus

The Law School
Walter F. Mondale Hall

229–19th Avenue South
Minneapolis, MN 55455
www.law.umn.edu

June 9, 2023

Re: Clerkship Application of Isabel Park

Dear Judge:

I write with the highest regards for Isabel Park in support of her application for a clerkship in your chambers. Isabel was a star student in my Civil Rights Appellate Clinic in Spring 2023, where I supervised her work on a U.S. Supreme Court amicus brief in the case *Navajo Nation v. Arizona* and a Minnesota Court of Appeals case involving tricky subject matter jurisdiction issues. Isabel received the top grade in the clinic and frequently exceeded my expectations in the quality of her writing, editing skills, and legal analysis. But beyond those core skills that are key to success in a clerkship, she also has the soft skills that make her an exceptional teammate. She is kind and humble and has a genuine curiosity for the law that makes it a joy to work with her. I am confident she will thrive in chambers.

I designed the Civil Rights Appellate Clinic to train students on many of the same skills that I learned are critical to effective advocacy while clerking at all three levels of the federal judiciary. Before the semester started, Isabel started reading into the *Navajo Nation* case so that she was up to speed on the legal issues before diving into her assignment on the amicus brief. Having never encountered Federal Indian Law in law school or work, she quickly wrapped her head around the complex jurisdictional and substantive issues in the case and hit the ground running. To start, Isabel interviewed our client and then drafted narratives that brought the experiences of water insecurity on the Nation to life. She was also instrumental in editing and refining the whole brief so that it was of the highest quality and helpful to the Court. As affirmation of Isabel's hard work, the Navajo Nation's attorney referenced the brief during oral argument in a colloquy with Justice Alito.

In her other clinic assignment, Isabel confronted unsettled jurisdictional questions under Minnesota law, synthesized the relevant case law, and then drafted a well-reasoned and persuasive draft setting forth our argument. Her draft required minimal editing and, after double-checking her work, I learned I could trust her use of the relevant case law.

Across the board, Isabel exhibited that she is a skilled writer and editor. She is exceptionally detail-oriented, and at times improved my own writing during the final stages of preparing a brief for filing. She was dedicated to the clinic's work (often taking on extra research and proofreads to make sure the final product was top-notch) and dedicated to her own development (both through seeking feedback and learning organically from my edits to her work).

Isabel's performance in the clinic reflects that she has hit her stride in law school, where she is thriving. She received all A-level grades over the last three semesters, including receiving an A in Eighth Circuit Judge David Stras's Supreme Court seminar this past semester. She is a Senior Articles Editor of the Minnesota Law Review, was invited to participate in the McGee National Civil Rights Moot Court Competition team next year, and (to my delight) will serve as a Student Director in my clinic this summer and next year. To each of these activities, she brings a gentle confidence and unflappable work ethic that makes her a calming and reliable teammate.

Beyond her success in law school, Isabel is also an accomplished and former pre-professional pianist. She has an intellectual curiosity that was ignited during undergraduate coursework in 17th and 18th Century philosophy. And she maintains a deep connection to her Korean heritage.

I have full confidence that Isabel will make an exceptional law clerk. I hope you will consider her for the position, and please reach out with any questions.

Sincerely,

Elizabeth Bentley

Elizabeth Bentley
Visiting Assistant Professor of Law
Director, Civil Rights Appellate Clinic
University of Minnesota Law School

June 14, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to strongly recommend Isabel Park for a judicial clerkship. Isabel is immensely talented, hardworking, and a pleasure to be around, and I am certain she will become a leader in the legal profession. I have no doubt that she will make a terrific addition to your chambers.

I first met Isabel when she reached out to me at the beginning of her 1L year, asking if she could work as my research assistant. Impressed with her initiative, I asked her to help me with a paper I was working on about content moderation on decentralized social-media platforms.1 She has done an absolutely fabulous job. I have had many excellent research assistants over the years, and I can say with confidence that Isabel has been the best one by far. She works extremely quickly, carefully, and thoroughly. And she has the very rare ability to anticipate what my follow-up questions will be and to provide answers to them before it even occurs me to ask. I think immensely highly of Isabel's abilities, and she is at the very top of my list for all future research projects. In my experience as a law professor and former clerk, the closest experience to clerking is working as a research assistant. On that basis alone, I am 100% confident that Isabel will be a tremendous clerk.

Although I have not yet had the pleasure of having Isabel as a student in one of my classes, I can speak to her academic performance, which has been very good. While her first semester grades were admittedly a bit mixed, her second-semester performance is superb, with straight-A level grades. This trajectory demonstrates that Isabel has fully gotten into the groove of law school, and I anticipate continuing excellent academic performance. She was also recently selected to be a staffer on the Minnesota Law Review, which will further improve her research and writing skills.

Isabel is also the rare student who both excels in the law and has a rich set of outside interests. When she was high school, she planned to be a professional pianist, a career that was unfortunately derailed by an injury. Undeterred, she studied sociology at the University of Michigan, where she participated in the Putnam Competition, the most prestigious mathemat- ics competition for undergraduates in the United States and Canada—not a typical extracurricular activity for a sociology major!—and founded the University of Michigan Journal of Bioethics. Before law school, Isabel also considered attending divinity school at the University of Chicago, which offered her a full merit scholarship. Isabel is a woman of many talents and interests!

On a personal level, I can also strongly recommend Isabel, whom I've been fortunate to get to know outside the classroom. She's witty, pleasant, and kind, all critical attributes for a law clerk.

In sum, I very strongly recommend Isabel for a clerkship. Please feel free to contact me if you should have any questions about Isabel or if I can be of assistance in any way.

Yours sincerely,

Alan Z. Rozenshtein Associate Professor of Law azr@umn.edu

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

March 2023

Re: E. Isabel Park

To Whom It May Concern:

I write in support of Ms. Eun Isabel Park's application for a judicial clerkship with you. Ms. Park, who goes by "Isabel," served as a judicial extern in my Chambers this past summer from May through July 2022.

Isabel very quickly proved herself to be a talented writer and ably assisted with a variety of administrative duties. In addition to preparing minute orders, she drafted a complete report and recommendation in a petition for writ of habeas corpus—work that I rarely assign to summer externs because of its complexity. Isabel's work product was consistently thorough and carefully researched. She is smart, very smart, but not at all showy about it. More importantly, Isabel was always open to receiving constructive feedback to improve her writing.

As a colleague, Isabel is personable, conscientious, and eager to assist—as demonstrated when she jumped in to research an unfamiliar (to her!) evidentiary issue under California's Song-Beverly Act that arose during a jury trial I was conducting, just days after her externship commenced. It was a pleasure having her as part of my Chambers team. Among the many summer externs I have had in the last seven years, Isabel ranks among the very best. I strongly encourage you to interview her for a clerkship position.

Please feel free to contact me directly if I can be of further assistance.

Sincerely,

Karen L. Stevenson

Honorable Karen L. Stevenson
Chief Magistrate Judge

KLS:ks

E. Isabel Park

511 S 4th St, Apt 312 · Minneapolis, MN 55415 | (408) 209-2575 | park2714@umn.edu

WRITING SAMPLE

This writing sample is a cert pool memo I prepared for Judge David Stras's Supreme Court seminar this semester. In the memo, I analyzed a climate change case that was petitioned for certiorari to the Court and ultimately recommended that the Court deny the petition. The word limit for the assignment was 2,000 words. I received an A+ on the assignment. It has not been edited by anyone else.

PRELIMINARY MEMORANDUM

January 20, 2023 Conference
Docket No. 22-361

BP p.l.c., et al.

Cert to CA4 (Floyd, Gregory, Thacker)

v.

Mayor and City Council of Baltimore

1. *Summary*: Petitioners are twenty-six multinational oil and gas companies that produced and sold fossil-fuel products, which they promoted through consumer deception. Respondent sued Petitioners in state court for a variety of claims, ranging from nuisance to negligent design defect, all arising under Maryland law. Petitioners removed the case to federal court, asserting eight grounds for federal court jurisdiction. This Court has seen this case before, when it ordered CA4 to review all of Petitioners' arguments for removal because it did in fact have appellate jurisdiction to do so. Petitioners now seek another review of CA4's subsequent order denying federal court jurisdiction on all eight grounds and affirming the remand of the case to state court, arguing that this case presents a pressing circuit split. I recommend **DENY** for various vehicular issues and because the circuit split is illusory.

2. *Facts and Decisions Below*: Facts: Based on Respondent's initial complaint, which was filed in state court, Petitioners extracted, produced, and sold fossil-fuel

products (i.e., coal, natural gas, and oil). *Mayor & City Council of Baltimore v. BP p.l.c.*, 31 F.4th 178, 195 (4th Cir. 2022). They also deceived consumers and the public by discrediting publicly available scientific evidence and creating "persistent doubt within the public sphere" about the harms of their practices, despite knowing "for nearly fifty years[] of a direct link between their products and climate-change threats." *Id.* (quotations omitted). Petitioners' actions caused rises in sea level and also more frequent and severe precipitation events, drought, heat waves, and extreme temperatures. *Id.* Respondent Baltimore alleged that it in turn suffered economic and social harms from the aforementioned climate-change-related impacts of Petitioners' conduct. *Id.* Seeking monetary and injunctive relief, Respondent brought eight state-law causes of action[1] against Petitioner. *Id.*

Petitioners timely removed the case to federal court, asserting eight statutory and other legal grounds for removal, including that federal common law governs Respondent Baltimore's claims. *Id.* at 196. Baltimore moved in response to remand its case back to state court. *Id.* The district court granted Respondent's motion; accompanying its decision was an order and opinion rejecting each of Petitioners' eight grounds for removal. *Id.* Petitioners appealed to CA4, which affirmed: it rejected Petitioners' argument that the federal courts had jurisdiction over their case under the federal officer removal statute and declined to address the remaining seven grounds for lack of appellate

[1] Eight seems to be the magic number in this case. The causes of action were: (1) public nuisance; (2) private nuisance; (3) strict liability for failure to warn; (4) strict liability for design defect; (5) negligent design defect; (6) negligent failure to warn; (7) trespass; and (8) violations of the Maryland Consumer Protection Act (MPCA).

jurisdiction. *Id.*

Petitioners then appealed to this Court, which remanded: without commenting on CA4's ruling on the single ground for removal, we clarified that § 1447(d) granted CA4 appellate jurisdiction over Petitioners' remaining arguments.[2] *Id.* at 196–97. Accordingly, we ordered CA4 to examine those arguments in the first instance, all of which CA4 subsequently rejected in a lengthy opinion. *Id.* at 195, 197.

Petitioners' first two argument are related. Petitioners classify Respondent's claims as "interstate-pollution claims" which, according to Petitioners, is governed by federal common law. Defs.' Suppl. Br. 3. They further allege that Respondent's claims implicate various federal issues, including national security and foreign affairs. *Baltimore*, 31 F.4th at 208. Applying the well-pleaded complaint rule, which limits courts to the four corners of a complaint when determining whether a lawsuit raises issues of federal law so as to create federal-question jurisdiction under § 1331, CA4 disagreed. *Id.* at 197. Plaintiffs (i.e., Respondent) had relied exclusively on state law in their complaint, and Petitioners "never [pointed] to the specific cause of action under federal common law." *Id.* at 198–99. Furthermore, CA4 found no "unique federal interests" or a "conflict" between the state and federal interests warranting the overriding application of federal law to Respondent's state-law claims. *Id.* at 201–03.

[2] Petitioners argued eight bases for removal to federal court: (1) federal common law; (2) substantial issues of federal law and foreign affairs under *Grable*; (3) complete preemption under the Clean Air Act; (4) federal enclaves; (5) the Outer Continental Shelf Lands Act; (6) the bankruptcy removal statute, 28 U.S.C. § 1452(a); (7) the admiralty jurisdiction statute, 28 U.S.C. § 1333(1); and (8) the federal officer removal statute, 28 U.S.C. § 1442(a)(1).

CA4 then rejected Petitioners' argument that the Clean Air Act (CAA) completely preempted state law. *Id.* at 204. While acknowledging that the CAA has ordinary preemptive force, the Court pointed to the Act's two savings clauses, which vest "state and local governments with the primary responsibility of controlling and preventing air pollution" and preserve their legal right to impose stricter limitations on air pollution than the Act does. *Id.* at 216 (citations and quotations omitted).

Next, CA4 rejected Petitioners' federal-enclave argument. Under *Stokes*, an injury sustained *within* a federal enclave confers federal jurisdiction. *Id.* at 218. But the city of Baltimore includes non-federal lands, so not "*all* pertinent events"—i.e., the injuries that Respondent Baltimore allegedly suffered—occurred on a federal enclave. *Id.* at 218–19 (citations omitted).

The spirit of CA4's rejection of Petitioners' remaining four arguments for federal jurisdiction, in a word, is remoteness. First, the Outer Continental Shelf Lands Act grants district courts jurisdiction of cases "arising out of, or in connection with . . . any operation conducted on the outer Continental Shelf." *Id.* at 219 (citing 43 U.S.C. § 1349(b)(1)). Standard statutory interpretation led CA4 to inquire whether a but-for connection between Petitioners' conduct and the Outer Continental Shelf existed, which it answered in the negative. *Id.* at 220. Second, the bankruptcy removal statute confers federal-court jurisdiction if there is a "close nexus" between the current action and a bankruptcy case such that the former "could conceivably have any effect" on the latter. *Id.* at 222–23 (citations omitted). Such was not the case, and CA4 found that no exceptions to this rule applied. *Id.* at 223–24. Third, CA4 rejected Petitioners' claim for removal under the

admiralty-jurisdiction statute because even if Petitioners' fossil-fuel extraction occurred on vessels engaged in maritime commerce,[3] the "*actual* torts" occurred on land, not on navigable waters or by vessels. *Id.* at 225–27. Lastly, CA4 held that the federal-officer-removal statute did not apply because, notwithstanding the contractual relationships between Petitioners and the federal government, Petitioners were neither "acting under" the government's direction nor "[performing] a job that, in the absence of a contract with a private [entity], the Government itself would have had to perform." *Id.* at 228–30. An "intensely regulated private firm[]" cannot invoke federal-court jurisdiction under the federal officer removal statute. *Id.* at 230.

For the foregoing reasons, CA4 affirmed the district court's order remanding Petitioners' case to state court, and Petitioners requested this Court to grant certiorari.

3. *Contentions*: Petitioner: Federal common law does in fact govern Respondent's claims. Interstate pollution is a narrow area that is "inappropriate for state law to control" because it implicates uniquely federal interests. Petition for a Writ of Certiorari at 7. Not only was CA4's finding of no uniquely federal interests incorrect, but its imposition of another "strict condition"—that a "significant conflict" exist between that interest and the application of state law for federal common law to apply—was improper. *Id.* at 11. The alleged torts committed by Petitioners has global implications. *Id.*

Further, this issue of "whether federal common law necessarily and exclusively

[3] CA4 also disagreed with Petitioners respect to the meaning of "vessel." *Id.* at 226–27.

governs" claims related to interstate greenhouse-gas emissions is one that circuits disagree on. *Id.* at 12. Given the ever-growing importance and volume of climate change litigation, this Court should decide authoritatively on the issue. *Id.* And, because the Solicitor General has filed a brief in *Suncor*, expressing its views on the same issues presented here, the time to do that is now. *Id.*

Brief in Opposition: Respondent agrees that removal could be warranted if its claims were federal law claims "disguised" as ones arising under state law. Br. in Opposition at 18. But they were not. Even if they were, any federal common law governing such claims was displaced by the Clean Water and Clean Air Acts. *Id.*

CA4 was correct in refusing to create a new exception to the well-pleaded complaint rule, which would effectively loosen the standards for removing cases to federal courts and disturb the delicate balance of federalism. *See id.* at 24–25. In doing so, CA4 abided by this Court's precedent, distinguishing cases that only speciously applied to this case (which Petitioners used to raise an illusory circuit split) and reached correct rulings on each of Petitioners' grounds for removal. *Id.* at 10–11, 15–17. Even setting this aside, the clear, pure state-law nature of Respondent's claims make this case a poor vehicle for deciding the issues raised. *Id.* at 3–4.

4. *Discussion*: Respondent's claims are not merely framed in terms of state law to evade federal-court jurisdiction, but "only [require] the resolution of questions of state law." *Id.* at 209 (citations and quotations omitted). Beneath the "broader story" of Petitioners' production of fossil-fuel products and their contributions to greenhouse gas pollution, Respondent ultimately seeks to hold Petitioners liable under tort law for

"concealment and misrepresentation of the products' known dangers" and the resulting harms to Baltimore and its citizens. *Id.* at 233–34. And this is an area of law that has traditionally been placed within the ambit of the states.

Even the descriptor "interstate" with respect to the alleged torts and their resulting harms seems like a stretch, given that Respondent is Baltimore City, and not even Maryland State. *See Baltimore*, 31 F.4th at 218. A party "cannot establish removal jurisdiction by mere speculation and conjecture, with unreasonable assumptions." *Id.* at 222 (citations omitted). Petitioners have failed to establish concretely and specifically, either through the record or the law, that there is any federal element to this case, but expect CA4 and now this Court to agree with them that it does.

This Court decided, when it first saw this case on appeal, that the "wiser course" was for CA4 to examine all of Petitioners' arguments for removal in the first instance. *Id.* at 197. CA4 did so thoroughly and thoughtfully in its well-reasoned sixty-page opinion, taking care to consider and distinguish the cases that Petitioners cited and breaking down their representation that a circuit split existed on both issues presented. *See id*. In multiple instances, CA4 noted that it was following its sister circuits for lack of a compelling reason to depart from their decisions. *See, e.g., id.* at 214, 217, 220. Additionally, Respondent's point that the clear-cut state-law nature of its claims makes this case a poor one for resolving the issues presented is well taken.

As both parties have noted, this case is factually and procedurally similar to *Suncor*, which is currently pending before this Court. Petition for a Writ of Certiorari at 12; Br. in Opposition at 1. The only difference is that in *Suncor*, this Court invited the

views of the Solicitor General on behalf of the United States. The most sensible course of action seems to be to deny certiorari in this case, for all of the reasons stated above, and decide the issues in *Suncor*, if it seems appropriate to do so. CA4 dispels the notion that there is an urgent circuit split in need of resolution, and this Court may very well have a better opportunity to address the issues presented here in a future case.

I recommend **DENY**.

5. *Recommendation*: **DENY**.

There is a response. There are amicus briefs from Washington Legal Foundation and The National Association of Manufacturers. There is a reply brief.

February 20, 2023 Law Clerk Park

Applicant Details

First Name	**Jacob**
Middle Initial	**R**
Last Name	**Pavlecic**
Citizenship Status	**U. S. Citizen**
Email Address	**jpavlecic@uchicago.edu**
Address	**Address** Street **328 Route 8, Apt 3C** City **Maite** State/Territory **Guam** Zip **96910** Country **Guam**
Contact Phone Number	**7247997540**
Other Phone Number	**671-727-1802**

Applicant Education

BA/BS From	**University of Pittsburgh**
Date of BA/BS	**May 2018**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 4, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Legal Forum**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Hinton Moot Court**

Bar Admission

Admission(s)	**Pennsylvania**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Specialized Work Experience	**Appellate**

Recommenders

Nou, Jennifer
jnou@uchicago.edu
773-702-9494
Buss, Emily
ebussdos@uchicago.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

328 Route 8, Apt 3C
Maite, Guam 96910
671-727-1802
jpavlecic@gmail.com

6/18/2023

The Honorable Juan R. Sanchez
District Judge for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez:

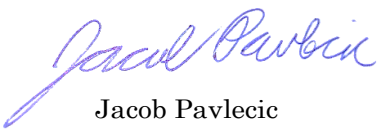
I am a Research Attorney with the Supreme Court of Guam and I would like to apply for the clerkship position in your chambers starting in 2024.

One thing I have confirmed in my time so far as a Research Attorney is that I have a deep appreciation for clerking. Nearly every cases offers a chance to learn something new, and the topics come any and every area of the law. Further, working as a clerk brings with it the unique perspective of trying to find the *right* answer, not merely a supportable answer. While I have enjoyed my time in Guam, I have never doubted where I wish to stake my legal career—Pennsylvania. That is why I took the bar in PA and I could not imagine a better opportunity than clerking in my home Commonwealth.

My experiences as a Research Attorney and those from law school have helped prepare me to efficiently and effectively complete projects for the Court. As part of the team in Guam, I have made contributions by highlighting and correcting issues in draft opinions and orders. While respectful, I care deeply about getting the decision right and will speak up when I think something is wrong. I also have an eye for detail. In my current job, I noticed a significant fact in the record that had gone unnoticed by both parties, the trial court, and the other law clerk assigned to the case. As Research Assistant for Professor Nou, I had to find real-world ramifications of a novel topic in administrative law: regulatory diffusion. I was also able to find relevant caselaw on this subject which had been overlooked by past research assistants.

My resume, transcript, and writing sample are enclosed. Letters of recommendation from Professors Jennifer Nou and Emily Buss will arrive under separate cover. Should you require additional information, please let me know. Thank you for your time.

Sincerely,



Jacob Pavlecic

Jacob Pavlecic

225 Whitehaven Drive, Gibsonia, PA 15044 • (724) 799-7540 • jpavlecic@uchicago.edu

Education

The University of Chicago Law School, Chicago, IL
Juris Doctorate, June 2022
- *Journal*: *The University of Chicago Legal Forum*, Comment Editor
- *Activities*: Hinton Moot Court, Participant; Student Admissions Committee, Member

University of Pittsburgh, Pittsburgh, PA
Bachelor of Arts in Politics and Philosophy, May 2018
Minors in Economics and French
- *Honors*: *summa cum laude*
- *Activities*: Pitt Political Review, Managing Editor; Pitt Mock Trial, Member

Experience

Supreme Court of Guam, Hagåtña, GU
Research Attorney, Sept 2022 – Sept 2023

City of Chicago, Law Department (Appeals Division), Chicago, IL
Summer Law Clerk, June 2021 – Aug 2021
- Drafted a motion to dismiss in a civil case before the Illinois Appellate Court
- Conducted research for cases on a variety of topics including mootness, gun control, and the scope of new trials
- Asked questions as a judge in a moot court to prepare a case for oral arguments

Professor Jennifer Nou, Chicago, IL
Research Assistant, June 2020 – Aug 2021
- Researched notable instances of sub-delegation of authority within federal agencies
- Conducted a literature review on the intersection of election law and administrative law
- Researched comments on and implications of regulatory diffusion in the United States

Betsy for PA Campaign (LD – 30), Gibsonia, PA
Field Director, July 2018 – Nov 2018
- Recruited and managed a network of 50+ volunteers
- Scheduled weekly canvasses and phone banks in collaboration with other campaigns
- Developed campaign strategy to determine where to devote resources to maximize vote share

Democratic Primary Candidate for LD – 30, Gibsonia, PA
Candidate for Pennsylvania State House, Jan 2018 – May 2018
- Formed and filed all reports for Campaign Committee
- Developed website and social media pages for the campaign
- Organized volunteers and obtained 400+ ballot petition signatures within three weeks
- Secured the endorsement of the Allegheny County Democratic Committee

Hobbies and Interests

- National Eagle Scout Association: Member
- Ice Hockey Officiating
- Proficient in French; Beginner in Japanese

THE UNIVERSITY OF CHICAGO

Name: Jacob R Pavlecic
Student ID: 12249968

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2019
Current Status: Active in Program
J.D. in Law

External Education

University of Pittsburgh--Pittsburgh Campus
Pittsburgh, Pennsylvania
Bachelor of Arts 2018

EP or EF (Emergency Pass/Emergency Fail) grades are awarded in response to a global health emergency beginning in March of 2020 that resulted in school-wide changes to instruction and/or academic policies.

Beginning of Law School Record

Autumn 2019

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law William Baude	3	3	179
LAWS	30211	Civil Procedure I Emily Buss	3	3	178
LAWS	30311	Criminal Law Genevieve Lakier	3	3	179
LAWS	30611	Torts Saul Levmore	3	3	177
LAWS	30711	Legal Research and Writing Cree Jones Patrick Barry	1	1	178

Winter 2020

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Richard Mcadams	3	3	179
LAWS	30411	Property Lior Strahilevitz	3	3	EP
LAWS	30511	Contracts Omri Ben-Shahar	3	3	EP
LAWS	30611	Torts Saul Levmore	3	3	177
LAWS	30711	Legal Research and Writing Cree Jones Patrick Barry	1	1	178

Spring 2020

Course		Description	Attempted	Earned	Grade
LAWS	30221	Civil Procedure II William Hubbard	3	3	EP
LAWS	30411	Property Lior Strahilevitz	3	3	EP
LAWS	30511	Contracts Douglas Baird	3	3	EP
LAWS	30712	Lawyering: Brief Writing, Oral Advocacy and Transactional Skills Cree Jones	2	2	EP
LAWS	47411	Jurisprudence I: Theories of Law and Adjudication Brian Leiter	3	3	EP

Summer 2020

Honors/Awards
The University of Chicago Legal Forum, Staff Member 2020-21

Autumn 2020

Course		Description	Attempted	Earned	Grade
LAWS	40201	Constitutional Law II: Freedom of Speech Genevieve Lakier	3	3	177
LAWS	43284	Professional Responsibility and the Legal Profession Anna-Maria Marshall	3	3	176
LAWS	50311	U.S. Supreme Court: Theory and Practice	3	3	178
Req Designation:		Meets Writing Project Requirement Sarah Konsky Michael Scodro			
LAWS	53498	Presence: Performance Skills for Lawyers Paul Marchegiani	2	2	179
LAWS	61512	Workshop: Law and Philosophy Brian Leiter Matthew Etchemendy	1	1	181
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Winter 2021

Course		Description	Attempted	Earned	Grade
LAWS	40101	Constitutional Law I: Governmental Structure William Baude	3	3	177
LAWS	41601	Evidence Emily Buss	3	3	177
LAWS	46101	Administrative Law Jennifer Nou	3	3	177
LAWS	50202	Constitutional Decisionmaking	3	3	179
Req Designation:		Meets Substantial Research Paper Requirement Geoffrey Stone			
LAWS	61512	Workshop: Law and Philosophy Brian Leiter Matthew Etchemendy	1	1	181
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Date Issued: 05/31/2022

THE UNIVERSITY OF CHICAGO

Name: Jacob R Pavlecic
Student ID: 12249968

University of Chicago Law School

Spring 2021

Course		Description	Attempted	Earned	Grade
LAWS	43253	Financial Regulation Law Eric Posner	3	3	182
LAWS	46001	Environmental Law: Air, Water, and Animals Hajin Kim	3	3	178
LAWS	53497	Editing and Advocacy Patrick Barry	2	2	P
LAWS	61512	Workshop: Law and Philosophy Brian Leiter Matthew Etchemendy	1	1	181
LAWS	94120	The University of Chicago Legal Forum Anthony Casey	1	1	P

Summer 2021

Honors/Awards
The University of Chicago Legal Forum, Comment Editor 2021-22

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	43282	Energy Law Joshua C. Macey	3	3	177
LAWS	53308	Food Law Omri Ben-Shahar	3	3	178
LAWS	90224	Abrams Environmental Law Clinic Mark Templeton Robert Weinstock	3	3	180

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process David A Strauss	3	3	177
LAWS	43263	American Legal History, 1800-1870: Revolution to Reconstruction Alison LaCroix	3	3	177
LAWS	53427	Law & Political Economy Ryan Doerfler	2	2	179
LAWS	90224	Abrams Environmental Law Clinic Mark Templeton Robert Weinstock	2	2	180
LAWS	92000	Greenberg Seminars: Effective Altruism Saul Levmore Julie Roin	1	1	P

End of University of Chicago Law School

OFFICIAL ACADEMIC DOCUMENT

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

I	**Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
IP	**Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
NGR	**No Grade Reported:** No final grade submitted
P	**Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
Q	**Query:** No final grade submitted (College only)
R	**Registered:** Registered to audit the course
S	**Satisfactory**
U	**Unsatisfactory**
UW	**Unofficial Withdrawal**
W	**Withdrawal:** Does not affect GPA calculation
WP	**Withdrawal Passing:** Does not affect GPA calculation
WF	**Withdrawal Failing:** Does not affect GPA calculation
	Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

H	Honors Quality
P*	High Pass
P	Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website:
http://registrar.uchicago.edu.

Revised 09/2016

A PHOTOCOPY OF THIS DOCUMENT IS NOT OFFICIAL

Professor Jennifer Nou
Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
jnou@uchicago.edu / 773-834-7658

June 18, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to highly recommend Jacob Pavlecic to you as a law clerk. He is among the finest research assistants with whom I have worked: Jacob is attentive to detail, a quick study and skilled at synthesizing large amounts of information. He is also an excellent communicator and someone who handles deadlines with ease. In short, I believe Jacob will be a superb law clerk.

Jacob has been a research assistant for me since last summer. My primary field of research is administrative law and I had projects that required a fair amount of sophistication. Back then, Jacob had yet to take a course on the subject, so I was unsure of what to expect. To my relief, he mastered the core ideas quickly. Even more impressively, Jacob was entrepreneurial in learning how to navigate various legal sources in order to find obscure regulatory documents such as public comments. Moreover, he even went out of his way to contact agencies in order to find older documents that were not available online. Perhaps needless to say, Jacob is creative with his research sources and does not give up easily. He does not leave a rock unturned.

I also quickly learned that Jacob is an excellent writer. Too often, I have research assistants that dump everything and the kitchen sink into a memo in an effort to show me that they have found information, no matter how irrelevant. These are usually a waste of my time. By contrast, Jacob's memos for me were tightly organized, focused, and well-written. It was clear he had done a huge amount of research, but he only included what was narrowly relevant to my questions. He also cited his findings carefully and meticulously.

Perhaps not surprisingly, Jacob has done well in the classroom. I had the pleasure to have him in my Administrative Law course this winter quarter. His final grade was a 177, at the median of an extremely strong cohort. Jacob came prepared to every class, ready to discuss the material. That said, I do not believe his grades in general reflect the depth of his skills – particularly those that would make him an excellent law clerk. After all, many grades are based on exams written under extreme time-pressure. His law review comment, in my opinion, better reflects some of his research and writing capabilities. In brief, the paper examines the scope of the Administrative Procedure Act's "good cause" exception for agencies to forego public notice and comment in emergency situations. He considers the relevant case law when analyzing the Centers for Disease Control's eviction moratoria. On this basis, he then concludes that the Trump Administration's invocation of "good cause" was illegal. Central to Jacob's analysis was his subtle observation that Congress had explicitly acted with regard to the appropriateness of public comment in the relevant statute. On the whole, the piece displays his ability to work with administrative materials; to analyze the relevant doctrines with care; and then to consider the relevant policy implications.

In the longer run, Jacob is likely to either work in private practice while involved in local politics and government, or else to enter government service directly, perhaps in an administrative agency. He comes from a family in Pittsburgh with a long history of local public service. Before law school, Jacob ran for his state House seat – coming 2nd in the primary by 304 votes out of 5,800 cast. The experience opened his eyes to the dynamics of elected politics and policymaking. As a testament to his commitment to serve his community, he then campaigned vigorously on behalf of the winner in the general election. In his spare time, Jacob volunteers his time as an icy hockey coach and referee. He plans to continue this volunteer work after law school as well.

In short, I believe Jacob will be an excellent law clerk and pleasure to have in chambers. He will also be a dependable and well-liked colleague to his co-clerks. After graduation, I very much expect him to become a leader in the legal community. Please do not hesitate to contact me with any questions. I can be reached at your convenience at jnou@uchicago.edu or at (203) 907-8618.

Best regards,

Jennifer Nou
Professor of Law
University of Chicago Law School

Professor Emily Buss
Mark and Barbara Fried Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
ebussdos@uchicago.edu | 773-834-0007

June 18, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Application of Jacob Pavlecic

Dear Judge Sanchez:

I am pleased to have the opportunity to write a letter of recommendation on behalf of Jacob Pavlecic, who has applied for a clerkship in your chambers. Jacob is a remarkable young man whom I greatly enjoyed getting to know in and out of the classroom.

I first taught Jacob Civil Procedure during his first quarter in law school. His blend of humor, charm and legal smarts made him a fresh and productive contributor to class discussion. Jacob repeated this playful and intelligent engagement in my Evidence class as an upper classman, brightening up some dreary COVID-19 constrained classes.

Jacob has many items on his resume that are well recognized indicators of achievement and the accrual of valuable experience: During law school, he served as a research assistant for faculty, a Comment Editor for The University of Chicago Legal Forum, and worked at the City of Chicago Law Department's Appeals Division. Since he graduated, Jacob has served as a research attorney on the Supreme Court of Guam, where he has written bench memos, and draft orders and opinions for the justices on the court. As his current position attests, Jacob also has a spirit of adventure, and the projects he has undertaken manifest his independent thinking and courageous spirit. To offer one example, Jacob ran, while still in college, for the Pennsylvania state legislature. After coming in second in a very close primary, he turned around and campaigned actively for his erstwhile adversary, learning a great deal about campaigning and politics in the process.

Jacob contributed significantly to our community in and outside the classroom even under these challenging pandemic conditions. I know he would make equally valuable contributions as a clerk in your chambers.

If I can be of any additional assistance in your consideration of Jacob's application, please do not hesitate to contact me by email at ebussdos@uchicago.edu or by phone at (312) 493-8949.

Emily Buss
Mark & Barbara Fried Professor of Law

Writing Sample for Jacob Pavlecic

The following is an excerpt from a Comment I prepared as a staffer for the *Legal Forum*, UChicago's topical law journal. My Comment centered on the use of the Administrative Procedure Act's good cause exception during the COVID-19 pandemic. In this excerpt, I summarize relevant portions of the caselaw on the good cause exception and argue that the CDC improperly invoked the exception when issuing its eviction moratoria.

I. PROCEDURAL REQUIREMENTS OF THE APA

Section 553 of the Administrative Procedure Act ("APA")[1] outlines the normal process most often used[2] by federal agencies to promulgate rules.[3] First, the agency must publish notice of the rule in the *Federal Register*,[4] give background and a summary on the rule,[5] and allow for public comment.[6] A writeup of the agency's consideration of the issues raised by commenters, and its response to commenter's concerns, will typically be issued as a preamble to the final rule.[7] Rules need to be published at least thirty days prior to their effective date.[8] Federal courts enforce these requirements by "hold[ing] unlawful and set[ing] aside agency action . . . found to be . . . without observance of procedure required by law."[9] Agencies can legally skip the above procedure if they have "good cause."[10] In the notice and comment context, the good cause exemption applies to rules where notice and comment would be "impracticable, unnecessary, or contrary to the public interest."[11]

When interpreting the notice and comment exceptions, courts generally do not apply a "formalistic" approach where each category is kept strictly separate from one another,

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[1] 5 U.S.C. §§ 551–59, 701–06 (2012).
[2] For the purposes of this Comment, "rulemaking" refers exclusively to "informal rulemaking" which is also called "notice and comment" rulemaking. Aaron L. Nielson, *In Defense of Formal Rule Making*, 75 OHIO ST. L.J. 237, 239–40 (2014). While the APA provides for a separate process known as "formal rulemaking," that type of rulemaking "has been effectively exiled from administrative law." *Id.* at 240.
[3] The APA defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4).
[4] The *Federal Register* is the official journal of the United States government, used to publish rules, proposed rules, and agency notices. 44 U.S.C. § 1505 (2012).
[5] 5 U.S.C. § 553(b).
[6] *Id.* § 553(c).
[7] Todd Garvey, *A Brief Overview of Rulemaking and Judicial Review*, 3 n.16, CONGRESSIONAL RESEARCH SERVICE (Mar. 27, 2017), https://fas.org/sgp/crs/misc/R41546.pdf [https://perma.cc/M8JD-6XH2].
[8] 5 U.S.C. § 553(d).
[9] *Id.* § 706(2)(D).
[10] *Id.* § 553(b)(B).
[11] *Id.* There is a separate good cause exemption for the effective date requirement which is not at issue here.

preferring instead to do one general analysis.[12] The "impracticality" and "contrary to the public interest" exceptions often get folded into one analysis.[13] However, one way they often get folded together is when there is a "factual emergency."[14] Given that this Comment is attempting to more precisely define to what extent the existence of emergencies can justify the good cause exceptions, it is helpful to still keep the exceptions conceptually separate to better understand when an emergency should not justify their invocation.[15]

A. Impracticality

When an agency wishes to claim that it would be "impracticable" for a rule to undergo the notice and comment procedure, it must show that "the need to get the rules in place as quickly as possible" outweighs any "extra delay" caused by following normal procedures.[16] However, courts must be "alert to the danger that if an approaching deadline were automatic 'good cause,' agencies might wait until the eleventh hour to issue rules, rather than organize their procedures to allow notice and comment within the time allotted."[17] This is in contrast to agencies responding to "*unexpected* emergencies caused by events over which the agency had little control."[18]

"Courts have not been so understanding when the short time available is in part because the agency failed to plan adequately and began too late."[19] This is true even during

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[12] *See* Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 351–52 (1989).
[13] *Id.* at 351.
[14] *Id.* at 363. (A factual emergency being one where the reason an agency must adopt a rule without delay is . . . the existence of a factual situation threatening certain interests whose immediate protection is deemed extremely important.").
[15] As not even the CDC claimed that notice and comment would be unnecessary with its eviction moratoria, discussion of that exception is omitted. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,296 (Sept. 4, 2020) [hereinafter, "First CDC Moratorium"].
[16] Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exception*, 36 ADMIN. L. R. 113, 135–36 (1984).
[17] *Id.* at 136.
[18] *Id.* (emphasis added).
[19] *Id.* at 141.

a national emergency, such as the energy crisis of the 1970s. In one case, a court rejected the Federal Energy Administration's ("FEA") attempt to publish gasoline price controls without notice and comment.[20] Specifically, the court found it unconvincing for FEA to claim a gasoline shortage could justify a good cause exception "particularly in light of the fact that at the time the . . . regulation was effectuated, there was ample opportunity to solicit public comments prior to the . . . deadline."[21] The court further held that "even if FEA determined that the 30 day time frame for rulemaking was too long, a shortened time period could have been specified."[22]

B. Contrary to Public Interest

Next, there is the "contrary to public interest" exception; this provision is often used by agencies to justify action during emergencies, and they did so during the energy crisis.[23] However, as "the far-reaching nature of these emergency programs became more apparent . . . courts . . . tended to become impatient with constant claims of good cause to act without notice and comment."[24] For example, in *Tasty Baking Co. v. Cost of Living Council*,[25] the court found that while good cause existed to issue certain price controls in November 1971, the same good cause could not be used for updated regulations issued in February 1972.[26] In this case, the court said that the government could have held notice and comment in the intervening four months or at least have held an abbreviated comment period.[27] Thus, a significant consideration of whether to allow the good cause exemption

[20] Consumers Union of United States, Inc. v. Sawhill, 393 F. Supp. 639 (D.D.C.), *aff'd per curiam*, 523 F.2d 1404 (Temp Emer. Ct. App. 1975).
[21] *Id.* at 641.
[22] *Id.*
[23] *See* Jordan, *supra* note 16, at 120–21.
[24] *Id.* at 121.
[25] 529 F.2d 1005 (Temp. Emer. Ct. App. 1975).
[26] *Id.* at 1015.
[27] *Id.*

seems to be whether the agency ever allows for comments, even on a somewhat shorter schedule than normal.

Protecting public health can also sometimes qualify as good cause to waive the notice and comment procedures as "contrary to the public interest." For example, the Ninth Circuit upheld a rule issued by the Environmental Protection Agency ("EPA") without notice and comment that banned the use of certain pesticides.[28] This action was justified under the APA as the rule was meant to protect the pickers of certain crops, especially children.[29] Further, the EPA had issued its rule the same month it learned that the pesticides could cause harm.[30] Conversely, a district court came to the opposite conclusion with regards to a regulation aimed at stopping the spread of E.coli.[31] The regulation would have added new labeling requirements to uncooked meat.[32] However, the court held the good cause exemption inapplicable there, finding that the Department of Agriculture knew for "a number of years, not just months" that E.coli could be present in uncooked meat.[33]

II. THE CDC'S EVICTION MORATORIA

An effective discussion of the eviction moratoria requires an understanding of the state of affairs before the CDC enacted its first moratorium. On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act")[34] into law which, among other things, created its own temporary moratorium on all evictions.[35] This moratorium came into effect when the CARES Act was signed and lasted for 150

[28] Washington State Farm Bureau v. Marshall, 625 F.2d 296, 307 (9th Cir. 1980).
[29] *Id.*
[30] *Id.*
[31] *Texas Food Industry Association v. United States Department of Agriculture*, 842 F. Supp. 254, 256 (W.D. Tex. 1993).
[32] *Id.*
[33] *Id.* at 260.
[34] Pub. L. No. 116-136, 134 Stat. 281 (2020).
[35] *Id.* § 4024, 134 Stat. at 492–94.

days.[36] Thus, renters could be evicted again beginning on August 24. On September 4, ten days after the CARES Act moratorium had expired, the CDC issued its own eviction moratorium that took effect immediately and lasted until December 31, 2020.[37] To justify this first moratorium, the CDC cited to an existing regulation[38] that parrots language from the authorizing statute.[39] That statute authorizes the government to take measures to stop the spread of disease across states "including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection."[40]

Faced with the impending expiration of the CDC's eviction moratorium, Congress itself extended the CDC's first moratorium one month, to January 31, 2021.[41] On his first day in office, President Joe Biden took executive action to further extend the moratorium, this time until March 31, 2021.[42] For both moratoria, there was never an opportunity for the public to comment on the CDC's actions.[43] So, even though Congress extended the first

[36] *Id*. Technically, the moratorium lasted 120 days. However, the act also required that any tenant be given at least thirty days' notice before being evicted and such notice could not be given until the expiration of the 120-day period creating an effective 150 day eviction moratorium.
[37] First CDC Moratorium, 85 Fed. Reg. 55,292 (Sept. 4, 2020). While the CDC terms its action as an order, not a rule under the APA, it also includes the alternative langue that "[i]n the event that this Order qualifies as a rule under the APA, notice and comment and a delay in effective date are not required" based on the good cause exception. *Id* at 55,296. This Comment proceeds under the assumption that the eviction moratorium is a rule under APA and subject to the procedural requirements governing rules.
[38] 42 C.F.R. § 70.2 (2019).
[39] 42 U.S.C. § 264(a) (2012).
[40] *Id*. *See also* 47 C.F.R. § 70.2.
[41] Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, Div. N, Title V, § 502, 134 Stat. 1182, 2078–79 (2020).
[42] Alex Barth & Steven Williams, *CDC Eviction Moratorium Extended Until March 31, 2020*, JD SUPRA (Jan. 26, 2021), https://www.jdsupra.com/legalnews/cdc-eviction-moratorium-extended-until-8005894/ [https://perma.cc/SZF9-N4D9]. *See also* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8,020 (Feb. 3, 2021) [hereinafter Second CDC Moratorium]. Though the order was officially announced on January 29 and took effect on February 1, it was not officially published in the *Federal Register* until February 3.
[43] First CDC moratorium, 85 Fed. Reg. 55,292, 55,296 (Sept. 4, 2020); Second CDC Moratorium, 85 Fed. Reg. at 8,025–26.

moratorium (perhaps signaling its acquiescence to the agency's actions) the second moratorium raises the exact same issue, this time with even more emphasis: Congress specifically authorized a policy for only a short time and a federal agency unilaterally extended the policy without giving the public any opportunity to comment on its action.

III. THE CDC'S EVICTION MORATORIA IMPROPERLY INVOKED THE GOOD CAUSE EXCEPTION

To begin, the first CDC eviction moratorium[44] was promulgated relatively late in the pandemic, coming months into the crisis caused by COVID-19. While that does not automatically mean the CDC cannot use COVID-19 to invoke the good cause exception, it does raise some red flags. For example, the CDC knew as soon as the CARES Act was signed that the congressional eviction moratorium would expire in August. Further, information suggesting that evictions could lead to the spread of COVID was also available to the CDC since April 2020.[45] To the extent there was going to be an emergency on August 25 when the CARES Act moratorium expired, it was caused by the CDC's own inaction on this issue.

Also, the claim that a "delay in the effective date of the [eviction moratorium] would permit the occurrence of evictions—potentially on a mass scale—that could have potentially significant consequences" is at least partially flawed.[46] The first CDC eviction moratorium took effect ten days *after* the congressional one had expired. Thus, there already was a wave of evictions that took place.[47] Moreover, while the CDC moratoria had broader applicability,

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[44] First CDC Moratorium, 85 Fed. Reg. at 55,292–93.
[45] *See id.* at 55,294 n. 12 (citing a study published on April 27, 2020 showing how a significant source of COVID transmission is within households); *Id.* at 55,295 n. 26 (citing a study showing a breakout of COVID cases in a Boston homeless shelter—also published in April 2020).
[46] *Id.* at 55,296.
[47] *See e.g.* Charlotte Keith, *Locked Out*, SPOTLIGHTPA (Nov. 2, 2020), https://www.spotlightpa.org/news/2020/11/pa-eviction-cdc-ban-loophole-renters-despair/

it seems that its loopholes were bigger such that there were more evictions occurring under them than under the CARES Act moratorium.[48] So, while it is certainly true that less evictions occurred under the CDC moratoria than would have occurred without, the CDC nevertheless allowed at least one wave of evictions to take place before it promulgated its rule.

This highlights another distinguishing feature of the CDC's eviction moratoria; they were supplemental action in addressing an emergency already addressed by Congress. When agencies act in response to issues that Congress has already addressed, they are taking additional action *beyond* what Congress saw fit to enact. This is not to say that federal agencies should never be allowed to act when Congress enacts specific policies. However, when Congress has acted, unelected federal agencies should involve the public before acting beyond what Congress has done. A critical way to do this is to give the public the ability to comment on proposals for significant government action, even if it is on a truncated basis.[49]

Despite the concerns above, one court saw things differently. Before Congress had extended the first CDC eviction moratorium, several landlords filed suit against the CDC's action.[50] Only one of those cases, *Chambless Enterprises, LLC v. Redfield*,[51] addressed the

[https://perma.cc/EN6B-AEA9] (showing a spike in evictions the day the federal (and also state) eviction moratoria lapsed, before dramatically falling).

[48] *See id.* (showing elevated levels of evictions proceedings occurring under the CDC's eviction moratorium compared to the congressional one).

[49] *Cf.* Consumers Union of United States, Inc. v. Sawhill, 393 F. Supp. 639, 641 (D.D.C.), *aff'd per curiam*, 523 F.2d 1404 (Temp Emer. Ct. App. 1975); *Tasty Baking Co. v. Cost of Living Council*, 529 F.2d 1005, 1015 (Temp. Emer. Ct. App. 1975).

[50] Sylvan Lane, Landlords, *Housing Industry Sue CDC to Overturn Eviction Ban*, THE HILL (Oct. 23, 2020), https://thehill.com/policy/finance/522502-landlords-housing-industry-sue-cdc-to-overturn-eviction-ban [https://perma.cc/6FCN-NWTK].

[51] No. 3:20-CV-01455, 2020 WL 7588849 (W.D. La. Dec. 22, 2020).

good cause issue. Though it found that the CDC had good cause to issue the eviction moratorium,[52] that analysis does not hold up under scrutiny.

First, the *Chambless* court argues that good cause was justified as it had "life-saving importance."[53] Yet, the mere potential of adverse health effects has never been sufficient to invoke the good cause exception.[54] If this were the case, the EPA could issue a wide swath of its rules without notice and comment as many of its rules are designed to prevent harms to the public.[55] Also, despite the "life-saving importance" of issuing such a mortarium, the CDC let the CARES Act moratorium expire for over a week before it acted with its own moratorium. Finally, the eviction moratoria are only effective if people obey them, and the CDC did not have the authority to directly enforce its moratoria.[56] There is evidence that some landlords ignored the CDC's moratoria.[57] The CDC could have claimed more authority allowed stakeholders to raise their concerns, and potentially kept more people in their homes if it went through the notice and comment process.

Next, the court also argued that the CDC did act quickly given the circumstance, and it was only by late August that it realized the extent of the problem caused by expiring eviction moratoria.[58] This argument is also flawed. The CDC's first moratorium only applied

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[52] *Id.* at *11–12.
[53] *Id.* at *11.
[54] *Cf.* Texas Food Industry Association v. United States Department of Agriculture, 842 F. Supp. 254 (W.D. Tex. 1993) (holding that the purpose of slowing E.coli was not sufficient for the USDA to invoke the good cause exceptions).
[55] *Cf.* Babette E.L. Boliek, *Agencies in Crisis? An Examination of State and Federal Agency Emergency Powers*, 81 FORDHAM L. R. 3339, 3356 n.77 (describing the aggrandizement issue that could arise if the agencies could treat issues like climate change as emergencies).
[56] First CDC Moratorium, 85 Fed. Reg. 55,292, 55,294 (Sept. 4, 2020) (stating the Department of Justice may, on its initiative try to enforce lack of compliance with the CDC's order). *See also* Annie Nova, *The CDC Banned Evictions. Tens of Thousands have still Occurred*, CNBC (Dec. 5, 2020), https://www.cnbc.com/2020/12/05/why-home-evictions-are-still-happening-despite-cdc-ban.html [https://perma.cc/L5A5-C43K].
[57] *Id.*
[58] *Chambless*, 2020 WL 7588849 at *11–12 (including state level moratoria along with the CARES Act moratorium).

to states that have weaker protections than what the CDC offers.[59] It was clear well before August that individual states would have weaker protections once the CARES Act moratorium expired. For example, Mississippi announced on May 13, 2020 that by June 1, its local eviction moratorium would end.[60] Again, the CDC had several months' notice of a problem before it took action. As a final note, if the Trump administration is to be believed, the CDC only acted after Congressional inaction, not necessarily due to any specific findings.[61] The Biden administration acted similarly, asking the CDC to consider extending the moratorium, which the CDC did without citing back to the President's request.[62] This brings into question the idea that the CDC acted in response to information that had only just become available as opposed to acting at the order of the President.

Finally, the district court was too quick to dismiss the argument that the CDC was acting in an area where Congress had already made a policy choice—a time-limited eviction moratorium.[63] This district court felt this argument was only alleging that if the CDC acted sooner, it could have undertaken notice and comment before the CARES Act moratorium expired.[64] There is the additional argument that a federal agency, without consulting the

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[59] First CDC Moratorium, 85 Fed. Reg. at 55,293. This is because the statutory authority used by the CDC to issue the moratorium only applies when state level conditions are unsatisfactory.
[60] Jacob Gallant, *Eviction Suspension ends June 1 in Miss.*, WDAM (May 13, 2020), https://www.wdam.com/2020/05/13/watch-gov-reeves-gives-latest-pandemic-response/ [https://perma.cc/6HXZ-J5MP].
[61] *President Donald J. Trump is Working to Stop Evictions and Protect Americans' Homes During the COVID-19 Pandemic*, WHITEHOUSE.GOV (Sept. 1, 2020), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-working-stop-evictions-protect-americans-homes-covid-19-pandemic/ [https://perma.cc/M8A5-NA9T].
[62] *Fact Sheet: President-elect Biden's Day One Executive Actions Deliver Relief for Families Across America Amid Converging Crises*, WHITEHOUSE.GOV (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-elect-bidens-day-one-executive-actions-deliver-relief-for-families-across-america-amid-converging-crises/ [https://perma.cc/BRK4-XJE6].
[63] *See Chambless*, 2020 WL 7588849 at *11.
[64] *Id.* at *12.

public, decided to contravene a policy choice made by Congress.[65] To be clear, just because Congress enacted a limited policy does not mean federal agencies should be barred from creating more extensive ones. However, it is another matter entirely when after Congress has specifically enacted a limited policy, a federal agency then moves to take broader action without involving the public. Part of the reason the notice and comment process exists is to connect the public with democratically unaccountable federal agencies.[66] Since federal agencies only exercise the powers given to them by Congress,[67] it would be a mistake to simply ignore the argument that when federal agencies act in a way that goes beyond what Congress has done, they should have to involve the public and respond to their concerns to attempt to recreate some aspect of accountability.

This Comment does not take a position on whether the CDC's eviction moratoria were good policy in response to a pandemic. Rather, its focus is instead on whether the procedure through which the CDC promulgated the moratoria was valid. It was not. The CDC issued its eviction moratoria long after it became aware of the asserted harm. Further, the government acted despite Congress already acting to address the harm both rules had identified. At no point did the CDC give the public an institutionalized way to comment on its actions—when it could have embraced a shortened timeline. Whatever their substantive merits, the CDC's eviction moratoria were ineligible for the APA's good cause exception.

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65 Even setting aside the first CDC moratorium, which did differ slightly from the CARES Act one, the second CDC moratorium clearly differed from what Congress had authorized. Congress only extended the moratorium for one month and the CDC acted on its own to go beyond that. *Compare* Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, Div. N, Title V, § 502, 134 Stat. 1182, 2078–79 (2020), *with* Second CDC Moratorium, 86 Fed. Reg. 8,020 (Feb. 3, 2021).

66 *See* Kristin E. Hickman, *Did* Little Sisters of the Poor *just gut APA Rulemaking Procedures?*, YALE L. J. REG. (July 9, 2020), https://www.yalejreg.com/nc/did-little-sisters-of-the-poor-just-gut-apa-rulemaking-procedures/ [https://perma.cc/84D9-H4SV].

67 *See* National Latino Media Coalition v. Federal Communications Comm'n., 816 F.2d 785, 788 (D.C. Cir. 1987).

WRITING SAMPLE FOR JACOB PAVLECIC

The following is a mock-brief in opposition I prepared for my Supreme Court: Theory and Practice class. It opposes a grant of certiorari in the case *Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 937 (2020). In the assignment, I was responding to Facebook's actual petition for a writ of certiorari. The only filings available for this assignment were the petition and appendix A of the case. This brief is considered to have been filed on December 2nd, 2019 and therefore does not reference any case filed after that date.

This excerpt contains the Statement of the Case and a portion of the argument for denying Facebook's petition. Facebook alleged that the decision of the Ninth Circuit created or implicated three circuit splits; the argument in this excerpt addresses the second split named by Facebook.

STATEMENT OF THE CASE

1. As technology continues to develop, private companies have been creating more and more uses for an individual's biometric information. *See* 740 Ill. Comp. Stat. 14/5(a). Biometric information is unique information about a specific person including things like "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." *Id.* 14/10(a)–(b). Given that the "full ramifications of biometric technology are not fully known" and finding that the "[a]n overwhelming majority of members of the public are weary of the use of biometrics when such information is tied to finances and other personal information," *Id.* 14(d), (f), the General Assembly of Illinois saw fit to enact the Biometric Information Privacy Act ("BIPA") in 2008. Pet. App. 8a.

Among its provisions, BIPA requires any private entity that wishes to use the biometric information of consumers to develop a public policy detailing how the entity will handle that information. This includes procedures for destroying the information "when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first." *Id.* 14/15(a). BIPA also requires that, before any private entity may collect or obtain someone's biometric information, the entity must first receive the individual's consent. *Id.* 14/15(b). Consent can only be given if the entity details what information is being collected and how long the information shall be stored and used. *Id.*

2. Petitioner is Facebook, "one of the largest social media platforms in the world." Pet. App. 5a. One of the features of Facebook is that users may upload photographs to Facebook to share them with friends. *Id.* at 29a. In 2010, Facebook launched its "Tag Suggestions" feature to its platform. *Id.* The "Tag Suggestions" feature works by using "state-of-the-art facial recognition technology to extract biometric [information] from photographs that users upload." *Id.* at 30a (quotation omitted). With this process, Facebook creates a template of a

person's face based on "the geometric relationship of facial features unique to each individual, like the distance between a person's eyes, nose and ears." *Id.* (quotation omitted). Whenever a user uploads new photographs to Facebook, it runs an algorithm scanning the faces of the people in the photos to see if any face in the photo matches an existing facial template. *Id.* at 6a. If there is a match, Facebook suggests tagging the person in the photo which would identify the people in the photo by name and create a link to that user's Facebook page. *Id.*

3. Nimesh Patel, Adam Penzen, and Carlo Licta ("Patel et al") are the Respondents before this Court. Each of them is an Illinois resident and user of Facebook. *Id.* at 7a. Patel et al have all uploaded photographs to Facebook on their own profiles. *Id.* In August of 2015, Patel et al filed suit against Facebook in the Northern District of California for acquiring their biometric information, allegedly without their consent. *Id.* In addition, they argued that Facebook has never published a public policy detailing Facebook's biometric retention and destruction practices. *Id.*

In response, Facebook filed a 12(b)(1) motion to dismiss Patel et al's complaint for lack of subject matter jurisdiction. Pet. 12. Specifically, Facebook argued that Patel et al failed to allege a harm sufficient to create in injury in fact for the purposes of Article III standing. *Id.* As it was a motion to dismiss based on the pleadings, the district court "t[ook] all factual allegations in the complaint as true and dr[ew] all reasonable inferences in plaintiffs' favor." Pet. App. 31a.

4. On February 26, 2018, Judge James Donato denied Facebook's motion to dismiss this case. The court found that Facebook's alleged violation of the procedural rights conferred by BIPA amounted to a concrete harm sufficient to establish an injury in fact. *Id.* at 36a. Judge Donato noted that when a company fails to obtain consent before acquiring a person's biometric information, "the right of the individual to maintain her biometric privacy vanishes into thin air. The precise harm the Illinois legislature sought to prevent is then realized." *Id.*

While Facebook also tried to assert that its user agreement and data policy actually create compliance with BIPA, the court noted that those claims must be adjudicated at trial. *Id.* at 40a–41a. The only issue was whether Patel et al had alleged an injury in fact sufficient for standing; the district court found that they had.

5. Facebook then sought review by the Ninth Circuit which affirmed the ruling of Judge Donato. *Id.* at 27a. Applying this Court's, as well as its own precedent, the Ninth Circuit found that certain statutory violations can create a concrete injury without the need for any additional harm. Such statutes must be designed to protect concrete interests "as opposed to purely procedural rights," and "the specific procedural violations . . . [must] actually harm, or present a material risk of harm to, such interests." Pet. App. 13a (internal citation omitted).

The Ninth Circuit found that BIPA was meant to protect the concrete interest of privacy, the invasion of which "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 18a (citing *Spokeo v. Robbins*, 136 S. Ct. 1540, 1549 (2016). This was because creating "a face template using facial-recognition technology without consent (as alleged here) invades an individual's private affairs and concrete interests." *Id.* at 19a. The court found that BIPA established a privacy right of an "individual to maintain his or her biometric privacy." *Id.* at 21a (quotation omitted). Next, the Ninth Circuit analyzed whether the specific violations alleged by Patel et al presented an actual or a material risk of harm to Patel et al' privacy interests. BIPA made clear that only with the consent of individuals could private entities use those individuals' biometric information. *Id.* A failure to gain the consent of an individual to use his or her biometric data, therefore, "would necessarily violate the plaintiffs' substantive privacy interests." *Id.* Thus, the Ninth Circuit found Patel et al have suffered an injury in fact.

The Ninth Circuit denied Facebook's motion for a rehearing en banc on October 18, 2019. Pet. 2. Facebook then sought this Court's review in December of 2019.

REASONS FOR DENYING THE PETITION: THE NINTH CIRCUIT'S DECISION DOES NOT IMPLICATE THE MINOR CIRCUIT SPLIT ON THE IMMINENCE REQUIREMENT OF STANDING AND IS NOT GROUNDS FOR FURTHER REVIEW

1. This case does not implicate the second circuit split identified by Facebook. It is true that there is an acknowledged split among the circuits in the cases Facebook cites. Yet, this conflict centers on what is required for a "threatened injury" to be "sufficiently imminent" to establish an injury in fact. *Beck v. McDonald*, 848 F.3d 262, 274 (4th Cir. 2017). Concrete injuries that confer standing can be "actual or imminent." *Clapper v. Amnesty International USA*, 568 U.S. 399, 409 (2013). Unlike the cases comprising this circuit split, in the present case, there is an *actual* harm—not an imminent one. The district court made clear that the procedural violation asserted by Patel et al constituted an "*actual* and concrete harm." Pet. App. 35a. (emphasis added). While the Ninth Circuit did not make explicit its finding on whether the harm was actual or imminent, it stated that when an entity violates the implicated sections of BIPA, "the right of the individual to maintain his or her biometric privacy *vanishes* into thin air." Pet. App. 21a (emphasis added) (internal citation omitted). Using the present tense, the Ninth Circuit is saying that Patel et al have suffered a harm; there is no need to speculate over if a harm may appear in the future. The privacy rights of the Patel et al "vainishe[d] into thin air" when Facebook failed to obtain their consent et al and failed to provide them with a disclosure, thus creating an actual injury.

Facebook erroneously asserts that the Ninth Circuit held the injury suffered by Patel et al is an imminent one, as opposed to actual. Pet. 21–22. To support this conclusion, Facebook selectively quotes a few sentences of the Ninth Circuit's opinion where it discussed some ways that one's biometric information could be misused. *Id. See also* Pet. App. 17a–19a.

However, in that portion of the opinion, the Ninth Circuit was only trying to establish "whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights)." *Id.* at 15a. It was not looking at the specific allegations made by Patel et al. Instead, the court was only explaining some interests BIPA was meant to protect. When the court cited to possible harms, it did so in support of the proposition that biometric information was something worthy of protection. *Id.* at 17a. It was only in the next, entirely separate section of the opinion where the court turned to the "the specific procedural violations alleged in this case." *Id.* at 20a (internal citation omitted).

In this next section, the Ninth Circuit described the Patel et al' harms in the present tense. *Id.* at 21a ("Facebook's alleged violation of these statutory requirements would necessarily *violate* the plaintiffs' substantive privacy interests. . . . [W]hen a private entity fails to adhere to the statutory procedures the right of the individual to maintain his or her biometric privacy *vanishes* into thin air." (emphasis added) (internal citation omitted). This shows the Ninth Circuit considered the harm suffered by Patel et al to be an actual harm, not an imminent one. Moreover, for Facebook's argument to be correct, that would mean the Ninth Circuit would have overturned the district court's finding that Patel et al suffered an "actual and concrete harm." Pet. App. 35a. It strains reason to claim that the Ninth Circuit overruled this finding implicitly, in an unrelated portion of the opinion, and in opinion purporting to simply affirm the lower court's decision. The much more plausible scenario is that Ninth Circuit agreed with the district court—the harms suffered by Patel et al were actual and thus this case does not implicate the second circuit split.

2. When one begins to consider the specific cases comprising the circuit split, it becomes even clearer how dissimilar they are to the present issue. While those cases also dealt with privacy concerns, they are not at all similar to the ones here. BIPA is meant to protect a person's biometric information—a core aspect of one's privacy. In the cases

comprising this circuit split, the issue was the potential disclosure of private information to third parties. *In re 21st Century Oncology Customer Data Security Breach Litigation*, 380 F.Supp.3d 1243, 1251 (M.D. Fla. 2019) (discussing the split in-depth). In those cases, the plaintiffs voluntarily gave the defendants the private information that was at issue; they just did not want their information given to third parties. Patel et al did no such thing. They only gave Facebook pictures. Facebook then took those pictures and extracted the biometric data from them; at no point did Patel et al provide Facebook with the specific measurements constituting their facial geometry.

This current dispute is thus based on Facebook taking information from Patel et al in the first instance without their consent. For the cases comprising the circuit split, the harm alleged by the plaintiffs only occurred if their data was shared with a third party. That is why courts categorized their harm as imminent rather than actual because it was not always clear if the third parties had accessed the plaintiff's private data. Here, by contrast, there is no such dispute. Facebook unquestionably took the private information at issue and Patel et al are suing Facebook for its own actions, not the potential actions of some third party.

A final nail in the coffin of the argument that the second circuit split applies to this case is Facebook's inclusion of *Electronic Privacy Information Center v. U.S. Department of Commerce* ("*EPIC*"), 928 F.3d 95 (D.C. Cir. 2019) as one of the cases in the split. Despite coming relatively late in the split, that case makes no mention of any other case comprising the circuit split. Moreover, when other courts talk about this circuit split, they do mention the D.C. Circuit, but not *EPIC*. *See e.g.*, *21st Century*, 380 F. Supp. 3d at 1251 (M.D. Fla. 2019). Instead, courts typically cite to the D.C. Circuit's case *Attias v. Carefirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017). *See e.g., 21st Century*, 380 F.Supp.3d at 1251. Facebook's attempt to force *EPIC* into the circuit split is understandable; *EPIC*'s inclusion would broaden the applicability of this particular circuit split. However, the truth is that while there is a circuit

split, it is on the very specific issue of "whether an increased risk of identity theft subsequent to a data breach is a cognizable injury in fact." *21st Century*, 380 F.Supp.3d at 1250. *See also* Pet. 22 ("Our sister circuits are divided on whether a plaintiff may establish' standing 'based on an increased risk of future *identity theft*." (quoting *Beck*, 848 F.3d at 273) (emphasis added).

If this were not the case, then *EPIC* would be inconsistent with *Attias*. Facebook itself argues *EPIC* supports the holding that "the possibility that a plaintiff's personal information may be misused does *not* create standing absent an imminent risk of injury." Pet. 7. (emphasis added) Yet in *Attias*, the court held that the "substantial risk of identity theft" does constitute an injury in fact. *Attias*, 865 F.3d at 628–29. This contradicts the Third Circuit (with whom Facebook asserts the D.C. Circuit is in agreement, *see* Pet. 23) which has stated "allegations of an increased risk of identity theft resulting from a security breach are [ ] insufficient to secure standing." *Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011). The D.C. Circuit did not contradict itself with *EPIC*. Instead, it is far easier and more accurate to distinguish it from *Attias* because *EPIC* did not deal with the risk of identity theft like every other case in the circuit split mentioned by Facebook. Once *EPIC* is swapped for *Attias*, any claim that this circuit split bears on the present case fall apart. This case does not concern potential identity theft; it is about an invasion of privacy that allegedly already occurred.

3. In addition, this circuit split is not even as deep or as remarkable as Facebook tries to make it seem. For example, while the Fourth Circuit in *Beck* recognized the existence of a circuit split, it did not purport to deepen it. *Beck,* 848 F.3d at 273. Rather, it provided one way to read the cases without creating any conflicts. *Id.* at 274. In one set of cases, there was either an intentional data hack and/or one of the named plaintiffs pleaded they had suffered from identity theft stemming from involvement with the defendant. *Id.* Conversely, in the cases that found a lack of standing, there were no allegations that anyone had suffered any

instances of identity theft. *Beck*, 848 F.3d at 274. The only explicit break the Fourth Circuit took with some other circuits was over whether a defendant's offer "to provide free credit monitoring services" to plaintiffs can confer standing in identity theft cases. *Id.* at 276.

Further reconciliation of these cases is provided by Judge Mary S. Scriven who posited "the differing sets of facts involved in each circuit's decision are what appear to have driven the ultimate decision on standing, not necessarily a fundamental disagreement on the law." *21st Century*, 380 F.Supp.3d at 1251. Judge Scriven helpfully provides three factors that explain away most of the division among the circuits. *Id.* at 1251–54. Even if one tries to shoehorn this current case into this circuit split, going over the common factors reveal that this case would not further divide the circuits on this issue.

The first factor courts of appeals look to is the intent of the party that acquires the private information. *Id.* at 1251–52. There is no question that Facebook had the intent to acquire the information at issue in this case; that is the entire point of their algorithm analyzing uploaded photographs. True, they are not a third party accessing the information as in the other cases. Yet, in the other cases, the plaintiffs gave their specific data at issue to the defendants. Facebook, allegedly without the consent of Patel et al, took the data for itself.[1] So, on this factor, the decision below would be in accordance with the other circuits.

Next, courts considered "the type of information compromised." *Id.* at 1253. On the lower end was relatively easy information to change: credit and debit card numbers. *Id.* The circuits are divided on whether information such as credit card numbers can create an injury in fact. Courts are generally more protective of information like Social Security numbers which are harder to change. *Id.* Biometric information is even more static in that it cannot

[1] To be clear, the data Facebook took from Patel et al is their specific facial geometries which Facebook calculated from the photographs submitted by Patel et al. Patel et al do not contend Facebook's use of the photos themselves constitute an invasion of privacy.

be changed. Thus, the information at issue in this case is at the highest end of the spectrum that leads to a finding of the existence of standing.

The final factor courts consider is whether the data at issue has been misused. *Id.* at 1254. In these cases that comprise the split, the data gets misused when third parties access the data. True, there is no allegation of potential misuse of data by third parties in today's case. However, the data at issue in those cases was turned over voluntarily by the plaintiffs; it was the potentiality that third parties would access the information that constituted the alleged harm. Here, in contrast, Patel et al never gave away their biometric information—Facebook itself acquired that information on its own. Further, it allegedly took that information without the consent of Patel et al. Thus, the data at issue in this case has already been allegedly misused; it was allegedly acquired in a manner inconsistent with law. On this factor, the case below is consistent with the themes of the circuits. In sum, even when analyzed among the differing circuits, the facts of this case support a finding that Patel et al have suffered a harm sufficient to establish an injury in fact.

4. As a final matter, this case would be a terrible vehicle to resolve the aforementioned circuit split. Every case cited by Facebook save one[2] deals with the same issue: whether an increased risk of identity theft is sufficient to create standing. It would thus be quite cumbersome to use a case about biometric data to resolve a circuit split on identity theft stemming from stolen account numbers and/or social security numbers. It is true that Ninth Circuit mentioned the possibility of misuse as a one reason Patel et al have been harmed.

[2] *EPIC* does not fall into the category but, as mentioned above, the D.C. Circuit does have another case that is more on point, *Attias*, and that case fits in with the other identity theft cases. Moreover, this case is likewise a poor vehicle to deal with the issue raised in *EPIC*. First, while BIPA does require information be given like the statute in *EPIC*, the basis for the present suit is predicated on a violation of privacy, not merely access to information as in *EPIC*. Finally, the law in *EPIC* did not have a consent requirement for the information which is present here. *EPIC*, 928 F.3d at 98. That is more than enough to make today's case dissimilar to *EPIC*.

Pet. App. 19a. However, that statement was mere dicta and crucially, not necessary for the court's overall holding that BIPA protects one's substantive privacy rights. The Ninth Circuit made that comment in the section of its opinion detailing the purpose of BIPA; the analysis focused on whether the entire law was meant to protect substantive, rather than merely procedural rights. It is the following section where the Ninth Circuit then turned to the specific statutory provisions at issue. It is in that section is where the court specifically finds harm and Facebook does not raise any issues dealing with this section. Thus, the speculation about future harm was superfluous to the Ninth Circuit's overall holding so using this case as a vehicle to address this issue would be an odd choice.

In addition, the information at issue in this case is worlds away from the information in the cases in the circuit split. As the district court acknowledged, "social security numbers do not implicate the kinds of privacy concerns that biometric identifiers do." Pet. App. 38a. Social security, account, and credit card numbers can be changed once compromised. Biometric information cannot. The information at issue in this case is of a different kind and poses an especial kind of risk if compromised compared to the information at issue in the other cases. Using this case a vehicle could very well leave the issues raised by the other cases unaddressed. The risk of identity theft from stolen data is a completely different type of harm than an alleged privacy violation from taking someone's biometric data. Thus, this case would prove an inefficient vehicle for addressing the minor inconsistencies that exist among circuits with respect to analyzing when the potential for identity theft constitutes an injury in fact.

Applicant Details

First Name	**Morgan**
Middle Initial	**E**
Last Name	**Peck**
Citizenship Status	**U. S. Citizen**
Email Address	**morgan.e.peck@vanderbilt.edu**
Address	**Address** Street **935 South Street** City **Nashville** State/Territory **Tennessee** Zip **21030**
Contact Phone Number	**4438951913**

Applicant Education

BA/BS From	**University of Notre Dame**
Date of BA/BS	**May 2020**
JD/LLB From	**Vanderbilt University Law School** **http://law.vanderbilt.edu/employers-cs/judicial-clerkships/index.aspx**
Date of JD/LLB	**May 10, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Vanderbilt Journal of Transnational Law** **Vanderbilt Social Justice Reporter**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Vanderbilt Law School Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Stack, Kevin
kevin.stack@vanderbilt.edu
615-343-9220

Maroney, Terry
terry.maroney@vanderbilt.edu
615-343-3491

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Morgan E. Peck
6 Brett Manor Ct.
Hunt Valley, MD 21030

The Honorable Juan R. Sánchez
United States District Court, Eastern District of Pennsylvania
14613 United States Courthouse
601 Market St.
Philadelphia, PA 19106

Dear Chief Judge Juan Sánchez,

My name is Morgan Peck. I am a rising third-year law student at Vanderbilt Law School, writing to apply for a clerkship in your chambers for the 2024–2025 term. I am eager to clerk for the Eastern District of Pennsylvania because this would be a spectacular opportunity to learn more about the law through the rigor of a federal clerkship while staying close to my family in the region.

I eagerly seek the opportunity to learn firsthand how decisions are made in chambers, so that I can better reach my goal of being a strong litigator representing indigent communities, particularly in immigration and employment cases. As a first-generation lawyer, I would benefit greatly from your invaluable insight into the practice of the law and the life of a case. I also look forward to the new challenges for legal writing and theory that a clerkship for an esteemed judge like yourself offers.

My passion for public service will motivate me to work efficiently and with close attention to detail in your chambers. I am focused on building a career supporting marginalized communities because I understand that the details matter not only for the application of the law, but also for the people impacted by the law. My time as an intern at Southern Migrant Legal Services introduced me to the various stages of the litigation process, from pre-trial motions to settlement conferences to final orders. While serving on two journals in law school, I have taken initiative, shown adaptable analytic abilities, and carried a thoughtfulness about social justice in my journal membership. Thus, as a second-year law student, I have gained experience not only in supporting the work of an established and celebrated journal, but also in building a new publication to fill a gap in the law school's academic and policy discussions.

I greatly appreciate your consideration of my application. Included are my resume, writing sample, law transcript, and letters of recommendation. I will be taking Federal Courts in the upcoming fall semester. My recommenders are Professors Kevin Stack and Terry Maroney. I can be reached at (443) 895-1913 or morgan.e.peck@vanderbilt.edu. Please let me know if you have any questions, and I hope to hear from you soon. Thank you again for your consideration.

Respectfully,

Morgan Peck

Morgan E. Peck

6 Brett Manor Ct., Hunt Valley, MD 21030
(443) 895-1913 • morgan.e.peck@vanderbilt.edu

EDUCATION

Vanderbilt Law School Nashville, Tennessee
Candidate for Doctor of Jurisprudence, May 2024, GPA: 3.778
Activities: Journal of Transnational Law, Executive Authorities Editor (2023–24); Social Justice Reporter Executive Board; Moot Court; Mock Trial; Legal Aid Society, Executive Director (2023–24), Street Law Director (2022–23); Law Students for Social Justice; Labor & Employment Law Society; OutLaw; 2022–23 Woodbine Immigration Clinic; 2022 Pro Bono Spring Break, Appalachian Citizens' Law Center

University of Notre Dame Notre Dame, Indiana
Bachelor of Arts in Sociology and Spanish, *magna cum laude*, May 2020
Honors & Activities: Glynn Family Honors Program; Student Body Senate; Hall Council; Project Fresh Hip Hop Crew; Not-So-Royal Shakespeare Co.
Study Abroad: Fundación José Ortega y Gasset-Gregorio Marañon, Toledo, Spain, Fall 2018
Thesis: *Religion and the State of Sanctuary: Navigating Pathways to Activation around Immigrant Rights in OR*

EXPERIENCE

CASA de Maryland, Inc. Baltimore, Maryland
Immigration Legal Intern, June 2023 – Present
Draft asylum declarations and other applications for relief from deportation. Assist with immigration clinics. Conduct legal research on complex asylum issues.

Southern Migrant Legal Services Nashville, Tennessee
Summer Law Clerk, June 2022 – August 2022; Legal Extern, Spring 2023
Conducted legal research on agency protocols, employment discrimination, and settlement enforcement. Wrote motions. Assisted with intakes and discovery. Participated in legal rights outreach.

Northwest Justice Project Yakima, Washington
Legal Rights Educator – Jesuit Volunteer/AmeriCorps Member, August 2020 – July 2021
Served as editor of the Spanish-language newspaper on legal and health issues impacting farmworkers. Created animated videos on local public health measures. Conducted in-person outreach in Spanish and English about labor and housing rights. Assisted with discovery, client preparation for interviews, and research on domestic violence.

American Bar Association, Commission on Immigration Washington, D.C.
Full-Time Summer Intern – Detainee Hotline, Summer 2019
Answered calls in English and Spanish from persons detained by ICE. Provided detainees with country reports and legal information packets. Helped report complaints against detention facilities for alleged abuse and negligent conditions. Developed a specialized resource guide for detainees who identify as LGBTQ+.

Indiana Legal Services South Bend, Indiana
Spring Intern – Intake Interviewer, Spring 2019
Gained client interview skills for civil legal cases, especially those involving domestic violence.

Duane Morris LLP Baltimore, Maryland
Summer Legal Intern, July 2018
Analyzed trends in energy and employment law. Wrote memoranda to support a pro-bono asylum case.

PERSONAL

Fluent in Spanish. Co-founded and coordinated a food sales program through my college residence hall to benefit women's education in Bangladesh. Interests include dancing, hiking, and creating greeting card artwork.